ILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 852

JOSE TERRONES RIOS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1959

CERTIORARI GRANTED APRIL 20, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 854

JOSE TERRONES RIOS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C. for the Southern District of California, Central Division	1a	1
Indictment	1a	1
Notice of Motion for (1) motion to inspect and (2) motion to quash indictment or suppress evidence	2	2
Affidavit of Joseph T. Forno	4	3
Exhibit A—Reporter's transcript of preliminary hearing in the Municipal Court of Los Angeles Judicial District, Div. No. 4, March 12, 1957	6	4
Testimony of Jack Olin Carter—Direct	9	5
Testimony of D. W. Beckmann—Direct	10	6
Cross	17	11
Testimony of Beverly P. Grace—Direct	28	18
Testimony of Beverly P. Grace—Cross	29	19
Offer in evidence	31	21
Plaintiff rests	32	21
Commitment	33	22

	Original	Print
Record from U.S.D.C. for the Southern District of California, Central Division—Continued.		
Notice of Motion for (1) motion to inspect and (2) motion to quash indictment or suppress evidence—Continued		
Exhibit B—Reporter's transcript of hearing in the Superior Court of the State of California in and for the County of Los Angeles, May 10, 1957	34	22
Affidavit of Harvey M. Grossman in support of (1) motion to inspect and (2) motion to quash indictment or suppress evidence	40	25
Order denying motions to inspect grand jury transcript and to quash indictment or suppress evidence	43	27
Verdict	44	28
Notice of appeal	50	28
Statement of points to be relied on	61	29
Clerk's certificate (omitted in printing)	64a	
Reporter's transcript of proceedings, July 15, 16, 23, 24, 25 and August 12, 1957 (excerpts from)	1	31
Appearances	1	31
Colloquy between court and counsel	4	31
Stipulation re evidence before court	7	32
Discussion re motions	9	33
Offer in evidence	32	47
Testimony of D. W. Beckmann—		
Direct	35	49
Cross	43	54
Redirect	77	72
Recross	79	74
Testimony of Beverly P. Grace—		
Direct	82	76
Cross	86	78
Testimony of D. W. Beckmann (recalled)—		
Cross	102	84
Redirect	104	86
Plaintiff and defendant rest	108	88
Argument by Mr. Grossman for defendant	108	88
Argument by Mrs. Bulgrin for plaintiff	121	97
Motion to inspect the grand jury transcript and motion to quash indictment denied	123	98
Motion to suppress evidence denied	128	101
Colloquy	136	101
Testimony of Jack Olin Carter—		
Direct	154	102
Testimony of Richard G. Wilcox—		
Direct	160	106

	Original	Print
Record from U.S.D.C. for the Southern District of California, Central Division—Continued		
Reporter's transcript of proceedings, July 15, 16, 23, 24, 25 and August 12, 1957 (excerpts from)—Continued		
Testimony of Granville McCready Smith—		
Direct	162	107
Cross	176	115
Redirect	184	121
Recross	185	121
Testimony of Beverly P. Grace—		
Direct	186	122
Colloquy between court and counsel	195	128
Testimony of Beverly P. Grace (resumed)—		
Cross	202	132
Testimony of D. W. Beckmann—		
Direct	213	139
Colloquy between court and counsel	226	146
Testimony of D. W. Beckmann (resumed)—		
Cross	227	147
Redirect	247	160
Verdict	322	163
Judgment and sentence	329	165
Reporter's certificate (omitted in printing)	330	
Proceedings in U.S.C.A. for the Ninth Circuit	331	166
Minute entry of argument and submission (omitted in printing)	331	166
Minute entry of order directing filing of opinion and filing and recording of judgment	332	166
Opinion, Hamley, J.	333	166
Judgment	341	175
Clerk's certificate (omitted in printing)	342	
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	343	176

[fol. 1-a]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 26019-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

JOSE TERRONES RIOS, Defendant

(U.S.C., Title 21, Sec. 174—Concealment of illegally imported narcotics)

Indictment—Filed June 19, 1957

The Grand Jury charges:

On or about February 18, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant JOSE TERRONES RIOS did, after importation, knowingly and unlawfully receive, conceal, and transport, and facilitate the concealment and transportation of a certain narcotic drug, namely: approximately 2 ounces 60 grains of heroin, which said heroin, as the defendant then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174.

A True Bill

Herbert J. A. Goldsworthy, Foreman.

Laughlin E. Waters, Laughlin E. Waters, United States Attorney, Bond fixed in the amount of ——

[File endorsement omitted.]

[fol. 2] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR (1) MOTION TO INSPECT, AND (2) MOTION TO QUASH INDICTMENT OR SUPPRESS EVIDENCE.—Filed July 11, 1957

To Laughlin E. Waters, United States Attorney for the Southern District of California:

Please Take Notice that on July 15, 1957, at the hour of 10 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Pierson M. Hall, United States District Judge, Federal Building, 312 North Spring Street, Los Angeles, California, defendant will move this Court for the following Orders:

1. An order permitting inspection by defendant of the grand jury proceedings in the above-entitled cause, on the ground that such inspection is necessary in the interests of justice.

2. An order quashing the indictment in the above-entitled cause in the ground that said indictment was based solely on evidence illegally obtained as a result of an unlawful search and seizure.

3. An order, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, precluding the United States Attorney from using certain evidence upon the trial of this action, said evidence consisting of a brown manila envelope and its contents. Said order will be sought on the ground that said property was illegally seized without warrant.

Said Motion will be based on this Notice of Motion, the [fol. 3] Memorandum of Points and Authorities in support thereof, the supporting Affidavits filed herewith, oral and documentary evidence which may be produced at the hearing, and upon the records and files of the Court.

Dated: July 10, 1957
Harvey M. Grossman
Attorney for Defendant

[File endorsement omitted.]

Proof of service (omitted in printing)

[fol. 4] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOSEPH T. FORNO IN SUPPORT OF: (1) MOTION TO INSPECT, AND (2) MOTION TO QUASH INDICTMENT OR SUPPRESS EVIDENCE.

STATE OF CALIFORNIA,
County of Los Angeles.

JOSEPH T. FORNO, being sworn states:

1. I am an attorney at law and a member of the firm of Forno & Umann. I make this Affidavit in support of defendant's motions to inspect the grand jury transcript and to quash the indictment or to suppress evidence.

2. Prior to March 12, 1957, criminal proceedings were instituted in behalf of the People of the State of California charging defendant with a violation of Section 11500 of the Health and Safety Code of the State. I was retained by Mr. Rios as his counsel of record in said proceedings.

3. On March 12, 1957, a preliminary hearing was had in said case in Division No. 4 of the Municipal Court in and for the County of Los Angeles before the Honorable Louis W. Kaufman, Judge presiding, at which Mrs. Florence Linn, Deputy District Attorney, appeared as counsel for the People and I appeared as counsel for Mr. Rios, said cause being denominated "The People of the State of California v. Joe Rios" and being case No. 136798 in the files of said court. The proceedings on said preliminary hearing were duly recorded by Helen Roberts, C.S.R., Official Reporter, [fol. 5] and subsequently transcribed under her direction. Attached hereto as Exhibit A, and incorporated herein by reference as though fully set forth, is a true and correct copy of the transcript of said proceedings. I was present at all the proceedings therein set forth and have examined the transcript and find that it presents a true and correct account of all the proceedings had on said preliminary hearing.

4. On May 10, 1957, the aforesaid case denominated "People vs. Joe Rios", came on for trial in Department 45 in the Superior Court of the State of California, before the Honorable Walter H. Odemar, Judge presiding, being case

No. 189270 in the files of the Superior Court. The proceedings at said trial were duly recorded by Carol E. Jacobs, C.S.R., Official Reporter, and subsequently transcribed under her direction. A true and correct copy of the transcript of said trial is attached hereto as Exhibit B, and incorporated herein by reference as though fully set forth. I was present throughout the trial as counsel of record for Mr. Rios and have examined Exhibit B and find that it presents a true and correct account of all the proceedings had at said trial.

5. Pursuant to the aforesaid proceedings of May 10, 1957, defendant was acquitted and released from custody.

Joseph T. Forno.

Subscribed and sworn to before me this 7th day of July, 1957 Burton Marks, Notary Public in and for said County and State

---

[fols. 6-8] EXHIBIT A TO AFFIDAVIT OF JOSEPH T. FORNO

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Division No. 4.

Hon. Louis W. Kaufman, Judge.

No. 136798

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

JOE RIOS, Defendant

Violation of Section 11500 of Health and Safety Code, a Felony

Reporter's Transcript of Preliminary Hearing Tuesday, March 12, 1957.

APPEARANCES:

For the People: Mrs. Florence Linn, Deputy District Attorney.

For the Defendant: J. T. Forno, Esq.
5/10/57, Dept. 45.

Judge Odeman

Not Guilty

Mar. 22, 1957

Helen Roberts, C.S.R. Official Court Reporter Los Angeles 12, California, Mutual 9211, Extension 3469

[fol. 9] Los Angeles, California, Tuesday, March 12, 1957: 1:45 O'clock P.M. Session.

The Court: People vs. Jos Rios.

Jack Olin Carter, called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mrs. Lynn:

Q. What is your occupation, sir?
A. Police Officer for the City of Los Angeles, assigned to the Scientific Investigation Division as a chemist.

Mrs. Linn: Counsel, will you stipulate that the witness is an expert chemist for the purpose of the preliminary only?
Mr. Forno: Yes, we will so stipulate.
Mrs. Linn: If your Honor please, I have a brown Manila envelope. May the envelope and its contents be marked People's Exhibit 1 for identification?
The Court: So marked.

By Mrs. Linn:

Q. Showing you People's Exhibit 1 for identification, have you seen that before, sir.
A. Yes, I have.
Q. When and where?

A. I first saw this package on February 19, 1957, when it was received in a sealed condition from the Central Property Division at the main Police Building.

Q. And what did you do with it, sir?

[fol. 10] A. It was next transported to the Police Laboratories and there opened by cutting around the red seal with a pair of scissors. Within the larger envelope was a smaller envelope, which was sealed with the gum of the flap. This was opened by cutting across the top with a pair of scissors. Within this was a rubber sheath containing 60 grams of a white powdery substance.

Q. Did you examine that powder, sir?

A. Yes, ma'am, I did.

Q. In your opinion what does it contain?

A. In my opinion it contains a powder commonly referred to as heroin.

Mrs. Linn: Cross examine.

Mr. Forno: No questions.

Mrs. Linn: Thank you, Officer. Officer Beckman.

D. W. Beckmann, called as a witness by and on behalf of the People being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mrs. Linn:

Q. What is your occupation?

A. I am a police officer for the City of Los Angeles, assigned to Juvenile Division.

Q. Are you one of the arresting officers in this case?

A. Yes.

Q. And when and where did you arrest the defendant?

[fol. 11] A. On February 18, 1957, at 10:50 p.m., at First and State Streets.

Q. Was he in a vehicle at that time?

A. Yes.

Q. What kind of a car was that?

A. A Yellow Cab, bearing the license No. 1116.

Q. What time was it you made this arrest?

A. 10:50 p.m.

Q. Prior to the time you stopped the car in which the defendant was passenger, did you observe this Yellow Cab?

A. Yes.

Q. Where did you first observe it?

A. I observed it parked on the northwest corner of First and Flower in the parking lot, next to an apartment house.

Q. And did you watch this cab?

A. Yes.

Q. How long did it remain parked in the parking lot?

A. I watched it for approximately five minutes.

Q. Did you see anyone get into the car?

A. Yes.

Q. Who got into the car?

A. The defendant.

Q. What happened next?

A. I followed the cab to First and State Streets.

Q. You mean the cab took off?

[fol. 12] A. Yes. The defendant entered the back seat of the cab, the cab driver then drove eastward on First Street.

Q. Did anything happen as you followed the cab?

A. The cab barely made the light at First and Flower, he made it on the red, it was a borderline case. The cab then stopped at First and Broadway and then proceeded eastward to First Street to State, where I stopped it at First and State.

Q. Were you driving this automobile?

A. No.

Q. Your partner?

A. Yes.

Q. And did you pull the cab over to the side, or was it stopped at a traffic light at that time?

A. The cab was stopped in traffic.

Q. What did you do, sir?

A. I approached the cab on the right side, with my badge in my left hand and my flashlight in my right hand, and I identified myself to the cab driver and also to the defendant who was sitting in the rear seat.

Q. What happened at that time?

A. When I identified myself to the defendant he reached in his jacket pocket, a blue jacket, and dropped a white object on the floor.

Q. On the floor of the cab?

A. Yes.

[fol. 13] Q. And did your partner come up by this time?

A. When he alighted from the cab I told him he was under arrest for suspicion of narcotics, and grabbed him by the arm.

Q. What happened?

A. At that time also I tried to retrieve the object on the floor of the cab. The defendant pulled away from me, and my partner, Policewoman Grace, arrived on my side of the car at that time, and I told her to pick up the stuff.

Q. Did you see her pick it up?

A. No.

Q. What did you do?

A. I pointed the stuff out to her, and the defendant broke loose from me and ran southbound on State Street and westbou*t* or eastbound in the alley just south of First Street.

Q. Did you then apprehend him?

A. Yes.

Q. Did you bring him back to the cab?

A. No.

Q. What happened next?

A. I finally took the defendant into physical custody at Second and Cummings. At that time my partner, Policewoman Grace, drove up in the police vehicle and gave me the object that the defendant had dropped on the floor of the cab.

Mr. Forno: That is objected to as being a conclusion [fol. 14] of the witness, your Honor. I move the answer be stricken.

The Court: Objection sustained.

By Mrs. Linn:

Q. What did she hand you?

A. She handed me the object that looked like the object that I pointed out to her that was laying on the floor of the cab, that I saw dropped.

Q. What did this object contain and what was it?

A. I looked at the object and observed it contained a whitish powdery substance.

Q. What did you do with it?

A. Put the object in my pocket. Went to Georgia Juvenile and to Georgia Receiving Hospital where I talked to the defendant and then booked the object.

Q. How did you book it?

A. Marked the rubber, clear rubber container that the powder was in, with my initials and serial number; placed it in a small envelope, put my serial number and initials on that envelope; sealed it. Placed it in a large Manila envelope, sealed it with sealing wax and placed my right—left—right thumbprint on it.

Q. Will you look at People's Exhibit 1 for identification?

A. Yes.

Q. Is that the object that you just testified to receiving from Officer Grace?

A. Yes.

[fol. 15] Q. And that was similar to what you saw dropped on the floor, is that correct?

A. Yes.

Q. At the time you were attempting to place the defendant under arrest, he ran from you several times, is that correct?

A. Yes.

Q. Did he say anything during this time?

A. When he alighted from the cab he exclaimed, "I haven't done anything, I haven't done anything." I repeated two or three times, "You're under arrest for suspicion of narcotics."

Q. What did he say?

A. Repeated, "I haven't done anything, I haven't done anything," and then ran.

Q. Did he say anything else?

A. After I caught him the first time in the alley he pleaded with me to kill him. I told him to stop struggling to come with me, I'd put him in the hospital. He kept repeating to me, "Kill me, kill me, I want you to kill me, go ahead and shoot me."

Q. After you got him to Georgia Street did you have a conversation with him relative to the Exhibit 1?

A. I had a conversation with him after I had finally subdued him at Second and Cummings, and also in the ambulance en route to Georgia Hospital.

Q. And what did he tell you about Exhibit 1?

A. When I asked him questions about Exhibit 1 he kept [fol. 16] saying "Later, later, I'll tell you later."

Q. During this attempt to place the defendant under physical restraint, was it necessary for you to shoot?

A. Yes.

Q. Did you hit the defendant some place?

A. I don't know whether I did or not.

Q. You did take him to George Street Hospital?

A. Yes.

Q. Why was that, sir?

A. The ambulance arrived, and put him in the ambulance and I accompanied them to Georgia Hospital.

Q. You do not know why an ambulance arrived?

A. We called the ambulance.

Q. Then he had been shot?

A. Well, he was wounded.

Q. Where was he wounded, if you know?

A. In the back, and he was bleeding profusely on the left front part of his abdomen.

Q. Was there some reason you had for following this Yellow Cab after you saw it parked in this parking lot?

Mr. Forno: Objected to as calling for a conclusion of the witness, your Honor.

The Court: Objection overruled. It will be accepted for the reasonableness of the search and the arrest.

The Witness: I had made a narcotic arrest of a narcotic dealer who was using a cab in that same locality approxi- [fol. 17] mately three months ago.

By Mrs. Linn:

Q. Was it unusual to see a cab parked there in that location?

A. Yes.

Mr. Forno: That is objectionable.

The Court: He can give his opinion. Objection overruled.

By Mrs. Linn:

Q. All that you testified to occurred in the County of Los Angeles?

A. Yes.

Mrs. Linn: Cross examine.

Cross-Examination.

By Mr. Forno:

Q. Officer, you say you do not know whether you shot him or not?

A. I shot at him.

Q. He was standing about a foot in front of you with his back toward you and his hands in the air at the time, was he not?

A. Of course not.

Q. Where was he?

A. He was running down the alley.

Q. It is your testimony that he was running at the time he was shot?

A. Yes.

Q. How far away from him were you?

A. Approximately 20, 25 feet.

[fol. 18] Q. Just to refresh your recollection, officer, it is not a fact that you told him to stop, and he stopped? And you told him to turn around, and then you shot him in the back?

A. No, that's not true.

Q. This is not a fact?

A. No, it's not a fact.

Q. In other words, you do not know how he got shot, you do not know whether you shot him or somebody else shot him, is that your testimony?

A. I shot at the defendant. I saw the defendant stagger. I then caught up with the defendant, at that time he was bleeding.

Q. Go ahead and finish.

A. At that time he was bleeding, and I felt I had probably shot him.

Q. You knew very well you shot him, did you not?

Mrs. Linn: Object on the ground it is argumentative.

The Court: Objection sustained.

By Mr. Forno:

Q. Did you hear any other gun go off besides your own?

A. No, all I heard was one shot.

Q. You are a Juvenile Officer, is that right?

A. Yes, sir.

Q. And since you have been on the police force how many arrests for narcotics have you made?

A. In the six months of 1956, from January until June, I [fol. 19] went to court on narcotic cases 39 times.

Q. Were you assigned to the Narcotic Detail during that period?

A. No.

Q. You went to court. I am asking you how many arrests for narcotics you have made while you have been assigned to Juvenile.

A. While being assigned to Juvenile?

Q. Yes.

A. 22 arrests in the last nine months.

Q. Those 22 arrests, how many times did you arrest a person who was in a Yellow Cab?

A. One.

Q. Once. And that was some three months prior to this arrest, is that correct?

A. Yes, sir.

Q. And during that three months period you have been following every Yellow Cab where you saw somebody get in and investigating it, is that correct?

A. No, sir.

Q. This is the only one that you followed?

A. Yes, sir.

Q. Now, where was the Yellow Cab when you first saw it that night?

A. Parked in the parking lot on the northwest corner of First and Flower.

[fol. 20] Q. And were you staked out in that location or did you just happen to be driving by?

A. I staked out on the cab.

Q. On this particular cab?

A. Yes, sir.

Q. Did you know the cab driver?

A. No, sir.

Q. By the way, do you know his name now?

A. I believe the name is Malcolm. Either the first name was Malcolm or the last name.

Q. This cab driver's name was Malcolm, but you do not know whether that was the first or last name?

A. Yes, sir.

Q. Do you have his address?

A. Yes, sir.

Q. What is his address?

A. It's on the arrest report. I can't recall what it is.

Q. You followed this cab from the parking lot to the intersection of First and Broadway, is that correct?

A. Well, I followed it—yes, to First and Broadway.

Q. All right. Did it stop at the intersection of First and Broadway or is that where it ran the red light?

A. No; it ran a red light at First and Hill and stopped at the red light at First and Broadway.

Q. And did you stop the cab at First and Broadway or continue to follow it?

[fol. 21] A. Continued to follow it.

Q. I see. And how far did you follow it?

A. Exactly two miles.

Q. From First and Broadway?

A. From First and Flower.

Q. First and Flower. Now, at the time you stopped the Cab how did you do it? Pull up beside it in the police car?

A. No, in back of it.

Q. In back?

A. Yes.

Q. Did you have a red light or siren on at the time?

A. No, sir.

Q. How did you signal the cab driver?

A. The cab was in back of another vehicle that was stopped at the red light. The cab was in the lane next to the double line at First and State Street. I was directly in back of the cab. I alighted from the cab—I alighted from the police vehicle on the right side, and my partner, policewoman Grace, alighted from the police vehicle on the left side; we approached the cab.

Q. The cab was stopped in traffic?

A. Yes, sir.

Q. At a signal. All right. What did you do after you approached the cab?

A. Identified myself.

Q. Now, did you have any conversation with the cab [fol. 22] driver at that point?

A. No. I identified myself.

Q. What was your purpose in identifying yourself? Were you placing anyone under arrest at that point?

A. The purpose for identifying myself?

Q. Yes.

A. Was to let the cab driver know I was a police officer, and to let the defendant know that I was a police officer, and if he had any junk on him he was either going to eat it, throw it, swallow it or stash it.

Q. You pulled up in back of the cab in traffic and you approached it from the righthand side. Were you proceeding to arrest either the cab driver or the passenger at that point, as you approached the cab?

A. As I approached the cab?

Q. Yes.

A. No, sir.

Q. What were you investigating at that point?

A. Narcotics.

Q. What information did you have that would lead you to believe that there was narcotics either concealed in the cab or on either the passenger or the driver of the cab at that particular point?

A. By the defendant's actions in the place where I first observed him and the known locality.

Q. You mean because somebody got into a cab this aroused your suspicion?

[fol. 23] A. His manner of getting into the cab.

Q. Well, did he get in in an unusual manner?

A. Yes.

Q. Describe how he got into the cab.

A. The cab was parked on the parking lot. The defendant walked out to the lot, walked over to the sidewalk, looked northward on Flower and south on Flower and down First Street. He looked in that direction. Then he walked back. After walking around on the parking lot he walked back and then got in to the cab.

Q. You had no prior information concerning this defendant or the cab driver prior to stopping the cab?

A. That's right, sir.

Q. You had no prior information, confidential informant or otherwise, as to narcotics?

A. As to the defendant or the cab?

Q. Yes.

A. That's right.

Q. You had never seen this defendant before, had you?

A. No, sir.

Q. You stopped the cab and you say the defendant got out. And he broke and ran. Which direction did he run, and on what street?

A. We were just west of the intersection of First and State. He broke and ran across the—there is a pedestrian safety zone in the middle of the street there—he crossed that and ran east to the corner and south to State Street, [fol. 24] to the alley.

Q. How far is that alley from First Street?

A. How far is the alley from First and State?

Q. Yes.

A. Approximately a hundred ninety to two hundred feet.

Q. After leaving the cab where did you first stop the defendant?

A. After leaving the cab and his breaking loose from me?

Q. Yes.

A. In the alley.

Q. That is when you shot him?

A. I stopped him in the alley.

Q. You stopped him in the alley?

A. Yes.

Q. And that is when you shot him, is that right?

A. That's when I shot at him.

Q. Shot at him. How many shots did you fire all together?

A. One shot.

Q. One shot. Well, there is some doubt in your mind, then, as to whether or not you shot the defendant, is that correct, Officer?

A. No.

Q. No doubt in your mind. All right. We've got that cleared up.

Now, on direct examination you testified that this defendant broke away from you several times. You have told

us about once when he broke away at the cab. Now, will you [fol. 25] tell us when he broke away from you on the other occasions?

A. When I caught up with him in the alley and observed that he was bleeding——

Q. This was after you shot him?

A. This is after I shot at him.

Q. I see. You still shot at him. You are not sure whether you shot him.

Mrs. Linn: I object as it is argumentative.

The Court: Sustained.

Mr. Forno: All right.

Q. He is bleeding now. Somebody shot him, right?

A. Well, he's bleeding.

Q. Is it your testimony that he broke away then?

A. Yes.

Q. What did he do? Describe that for us.

A. He tried to kick me in the groin.

Q. He tried to kick you. Well, what did he do?

A. What did he do?

Q. Yes.

A. Tried to kick me in the groin.

Q. Well, did he kick you?

A. No.

Q. Now, Officer, you say he tried to kick you in the groin. What did he do in that connection? Did he kick at you or kick you, or what?

A. Kicked at me.

[fol. 26] Q. Kicked at you. But he did not hit you?

A. He didn't kick me in the groin. I don't recall whether he kicked me in the leg or not.

Q. Now, that is when you hit him with the blackjack, is that right?

A. No.

Q. When did you hit him with the blackjack?

Mrs. Linn: Object to that as assuming facts not in evidence. I have not heard of a blackjack yet.

The Court: I have not heard any direct examination as to that. Sustained.

By Mr. Forno:

Q. Officer, did you hit this defendant with a blackjack or any object after he was shot?

A. I tried to hit him, yes.

Q. You tried to. With what?

A. With a sap.

Q. With a sap. A Blackjack?

A. Yes. You can call it a blackjack.

Q. You missed him?

A. Every time I'd take a swing at him with it, when I tried to subdue him—first, I tried to handcuff him, I couldn't handcuff him, he tried to kick me. I hoisted my weapon and took out my sap, tried to subdue him with my sap. Had trouble subduing him with my sap because he kept fighting me down the alley.

Q. This is while he was bleeding all of the time?

A. Yes.

[fol. 27] Q. You were dressed in plainclothes, were you not?

A. Yes.

Q. Did you have your badge in your hand to identify yourself at that point?

A. Not at that point.

Q. I see. Now, we have you shooting at him in the alley, the defendant bleeding, and you were trying to subdue him with this blackjack. Now, did he break away from you at any time there in the alley and run?

A. Yes.

Q. How far did he run and where did he run to?

A. I chased the defendant from where he left the cab to where I finally subdued him, it's exactly two-tenths of a mile.

Q. I know. We have been all through that from the cab. But I am talking about in the alley now, where you shot at him and the defendant started to bleed. How far from that point was it that you finally subdued him, or was it right at that point?

A. No. It was approximately a block and a half that I pursued him.

Q. A Block and a half from there?

A. Through the alley.

Q. Did you shoot at him more than once?

A. No.

Q. You were alone at the time in the alley, right?

A. Yes.

[fol. 28] Q. With the defendant?

A. Yes.

Mr. Forno: That is all.

Mrs. Linn: Thank you, sir. Policewoman Grace.

BEVERLY P. GRACE, called as a witness by and on behalf of the People, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mrs. Linn:

Q. What is your occupation?

A. Policewoman for the City of Los Angeles, assigned to Juvenile Division.

Q. And were you with Officer Beckmann on the evening of the 18th of February of this year?

A. Yes, I was.

Q. And were you driving the automobile that followed the Yellow Cab in which the defendant was traveling?

A. Yes.

Q. When Officer Beckmann got out of the police vehicle what did you do?

A. I got out on the left side and went up to the left side of the cab.

Q. Did you see some object on the rear floor of the cab?

A. Not at that time.

Q. Did you come around to the passenger side of the car?

A. I came around to the passenger side and Officer Beckmann pointed at an object and told me to pick it up.

[fol. 29] Q. Did you pick that object up?

A. Yes, I did.

Q. And what was it?

A. It was a rubber container filled with a powdery substance.

Q. And did you turn that over to Officer Beckmann later on?

A. Later on.

Q. Will you look at People's Exhibit 1, does that appear to be the same object that you picked up and turned over to Officer Beckmann?

A. Yes.

Mrs. Linn: That is all.

Cross-Examination.

Mr. Forno:

Q. You pulled up behind this Yellow Cab in traffic, is that correct?

A. That's correct.

Q. You got out on the passenger side?

A. I got out on the driver's side, I was driving.

Q. On the driver's side, I see. You left your car in traffic?

A. That's right.

Q. About how long were you out of your car before you got back in the car?

A. Minutes.

Q. Minutes. Two or three?

A. Three or four.

[fol. 30] Q. Where did you go from there? Did you drive some place?

A. I drove down the alley.

Q. Down the alley?

A. Yes.

Q. Did you see your partner shoot at someone in the alley?

A. No.

Q. Did you arrive after the shooting or before the shooting?

A. After.

Q. After the shooting. You saw this defendant bleeding did you, in the alley?

A. Not in the alley.

Q. Where was he at the time?

A. He was at Second and Cummings, laying in the curb.

Q. Beg pardon?

A. He was at Second and Cummings, laying next to the curb.

Q. You mean lying in the gutter?

A. That's correct.

Q. At Second and Cummings?

A. Yes.

Q. About how far is that from this alley?

A. Maybe a quarter of a block from the end of the alley, or less.

Q. Was he lying in the gutter on Cummings or on Second Street?

A. Second Street it would be.

Q. On Second Street. How far from the intersection of Cummings?

[fol. 31] A. 10, 15 feet.

Q. Your partner was there at the time?

A. Yes.

Q. Did you see him use a blackjack on the defendant?

A. No.

Q. Did you see a blackjack in your partner's hand at any time?

A. No.

Q. Did you see a gun in your partner's hand?

A. Yes.

Q. That was at Second and Cummings?

A. No.

Q. Where was it that you saw your partner with his gun in his hand?

As he was running down——

Q. Where?

A. First Street.

Q. Running down First Street?

A. Yes.—correction—that would be State Street.

Q. State. Which direction on State?

A. South.

Q. South. On which side of State Street?

A. The east side.

Mr. Forno: The east side. That is all.

The Court: That is all.

Mrs. Linn: Thank you very much.

Offer in Evidence

May the exhibit marked for identification be received in [fol. 32] evidence?

The Court: To be received in evidence and marked as People's 1.

Plaintiff Rests

Mrs. Linn: The People rest.

Mr. Forno: There will be no defense testimony at this time, your Honor.

Let me object to the introduction of the evidence, your Honor, and move the suppression of it on the ground it is obtained illegally in violation of the Search and Seizure Rule.

The Court: Motion will be denied.

Mr. Forno: There is no defense at this time. However, may I be heard on the matter of bail?

The Court: Yes.

Mr. Forno: I understand the present bail is $5000.00. This defendant has no prior convictions. And he was wounded in this arrest. He is in need of medical attention, your Honor, and I feel he would make bail in the sum of $2500.00; if he is able to get out he could secure proper medical attention. He has quite a serious wound.

The Court: Do you want to be heard on the matter of bail, Mrs. Linn?

Mrs. Linn: There is a tremendous amount of heroin in that exhibit, your Honor?

The Court: This is about the heaviest heroin case, as far as quantity is concerned, that we have had for some time, Mr. Forno. I think bail will have to remain at [fol. 33] $5000.00. The defendant is held to answer. The date of arraignment is March 26, at 9:00 a.m., in Department 41 of the Superior Court. Bail is $5000.00.

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, DIVISION No. 4.

No. 136798

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

JOE RIOS, Defendant

COMMITMENT

It Appearing to me that the offense in the within complaint mentioned, to wit, violation of Section 11500 of the Health and Safety Code, a felony, has been committed, and there is sufficient cause to believe the within named defendant, Joe Rios' guilty thereof, I order that he be held to answer to the same, that he be admitted to bail in the sum of Five Thousand Dollars, ($5000.00), and that he be committed to the custody of the Sheriff of Los Angeles County, until he gives such bail.

Dated this 12th day of March, 1957.

Louis W. Kaufman, Judge of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California Committing Magistrate

---

[fols. 34-35] EXHIBIT B TO AFFIDAVIT OF JOSEPH T. FORNO

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, DEPARTMENT 45

Hon. Walter H. Odemar, Judge

No. 189270

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

JOE RIOS, Defendant

Reporter's Transcript

May 10, 1957

APPEARANCES:

For the People: Harry P. Amstutz, Esq., Deputy District Attorney.

For the Defendant: J. Forno, esq., 139 N. Broadway, Los Angeles 12, California, MIchigan 4901.

[fol. 36] Los Angeles, California, Friday, May 10, 1957—2:00 P.M.

The Court: People against Joe Rios.

Mr. Amstutz: Ready, your Honor.

The Court: Pursuant to stipulation heretofore had in this Court, the Court has read and considered the contents of the reporter's transcript of Preliminary Hearing held on Tuesday, March 12, 1957, before the Honorable Louis W. Kaufman, Judge sitting as Committing Magistrate.

Mr. Forno: At this time, your Honor, the defendant moves to suppress the evidence and objects to the introduction of the evidence on the grounds of the illegality of the search and seizrue, your Honor.

In connection with that, if I may be heard briefly, as I recall the facts, the officer testified that he followed this cab, not from any information that he had received or confidential information, but from the fact that some months before he had arrested a narcotic dealer in a Yellow Cab. Now, he followed the cab, your Honor, for approximately two miles. There is no showing that he was—when he approached the cab, stopped the cab, it was in connection with a misdemeanor arrest or any violation of the law or traffic violation. He approached, his gun in one hand, his badge in the other, as I understand it, and that is when defendant jumped out of the car and ran, he said.

The Court: No, he had his flashlight in one hand and his badge in the other.

Mr. Forno: That is right, flashlight, and the badge. That [fol. 37] is right.

The Court: That is right.

Mr. Forno: And then he saw a white object in the rear of the cab. The defendant jumped out. He went after the defendant. Now, then, there was a shooting later on, but my——

The Court: No. Then he told the defendant the defendant was under arrest and the defendant broke away.

Mr. Forno: Yes. That is right, he ran. That arrest at that point, your Honor, in my opinion, was illegal arrest. There was insufficient proper cause in the matter of the arrest and the matter of the search. I submit that observation.

Mr. Amstutz: There is one case in point, the Oakland case; a taxicab late at night, the taxicab was double-parked. Your Honor is familiar with that one.

The Court: I am familiar with that case.

Mr. Amstutz: People submit the matter.

The Court: I am familiar with other cases, too, in the same district, San Francisco and Oakland, where the Court held just the opposite. The Court, District Court of Appeal held just the opposite and the Supreme Court denied further hearing thereon; and in that particular case—I don't always say this, but I, personally, agree much more with Judge Carter's dissenting opinion in that case than I do with the majority, and I don't always say that. I don't like to let out a man who had as much "stuff", as they call it, as Joe Rios had, but as I have so often said, and [fol. 38] different officers are having an opportunity to hear it, what in the world is the use of our having a Constitution and having rights if they are meaningless?

In this case, the officer very frankly stated up to the time of the arrest what happened. After that, when the fellow broke away, that is an altogether different story in my opinion. When the officer tells us, "You are under arrest, if it is an unlawful arrest, we might have our day in court, but when we run, after he once says that, we have to take the consequences. That is when the act becomes foolish, whether the arrest was originally proper or not.

As I see it, I can't possible see how this arrest could have originally been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted——

[fol. 39] Mr. Forno: Thank you, your Honor.

The Court: —with this big, long harangue, but it appears the officer is in court. I want him to know how I feel about it.

Mr. Amstutz: People rest.

Mr. Forno: People rest?

The Court: I find him not guilty as charged. They will get you sometime, Rios; they didn't get you this time but they will sometime.

Mr. Forno: Thank you very much, your Honor.

STATE OF CALIFORNIA,
County of Los Angeles.

I, CAROL E. JACOBS, Official Reporter of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing pages 1 to 4, both inclusive, comprise a full, true and correct copy of the proceedings had and testimony taken in the matter of the above entitled cause.

Dated this 2nd day of July, 1957.
Carol E. Jacobs, Official Reporter.

[Vol. 40] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HARVEY M. GROSSMAN IN SUPPORT OF: (1) MOTION TO INSPECT, AND (2) MOTION TO QUASH INDICTMENT OR SUPPRESS EVIDENCE—Filed July 11, 1957

Harvey M. Grossman, 6535 Wiltshire Boulevard, Los Angeles, 48, California, Olympia 2,0700, Olive 3-0460, Attorney for Defendant.

STATE OF CALIFORNIA,
County of Los Angeles.

HARVEY M. GROSSMAN, being sworn states:

1. I a man attorney at law and was appointed on June 24, 1957 by Judge William C. Mathes to represent the defendant as an indigent. I make this affidavit in support of defendant's motions to inspect the grand jury transcript and to quash the indictment or to suppress evidence.

Prior to March 12, 1957, criminal proceedings were instituted against the defendant in behalf of the People of the State of California, charging the defendant with violation of Section 11500 of the California Health and Safety Code, which prohibits, *inter alia*, possession of narcotics as set forth in the affidavit of Joseph T. Forno.

3. On March 12, 1957, a preliminary hearing was had in said proceedings, at which the only testimony aside from that of an expert witness who identified a white powder as heroin, was that of the arresting officers, D. W. Beckman and Beverly P. Grace.

[fol. 41] 4. On May 10, 1957, the state action came on for trial before Judge Walter H. Odemar as detailed in the affidavit of Joseph T. Forno. Said trial was had on the reporter's transcript of the preliminary hearing. Judge Odemar acquitted the defendant on the ground that the evidence upon wihch conviction was sought was unlawfully obtained by an illegal search and seizure without warrant, as detailed in the Forno affidavit, and particularly Exhibit B thereto.

5. Thereafter on June 19, 1957, an indictment was filed by the Federal Grand Jury for the Southern District of California, charging the defendant with receiving, concealing and transporting illegally imported narcotics in violation of Title 21 U.S.C., Section 174. Both the description of the alleged narcotic and the alleged date of its concealment were identical with those testified to by Officers D. W. Beckman and Beverly P. Grace in the state court proceeding, as set forth in the affidavit of Joseph T. Forno, particularly Exhibit A thereto.

6. I am informed and believe that the only evidence before the grand jury which returned such indictment, and the sole basis of said indictment was the testimony of Officers Beckman and Grace regarding their unlawful search and seizure of the package of heroin, to which they testified at the preliminary hearing in the state court proceeding, and upon the basis of which testimony Judge Odemar ruled the search and seizure were unlawful and acquitted the de-

[fol. 42] fendant. In order to establish that this is in fact the case, it is essential that defendant, through his counsel of record, be permitted to examine the transcript of proceedings before the grand jury, and I therefore believe that

this is a case where such an examination is required in the interests of justice.

Harvey M. Grossman.

Subscribed and sworn to before me this 8th day of July, 1957. Anna Taylor, Notary Public in and for said County and State.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS TO INSPECT GRAND JURY TRANSCRIPT, ETC.—July 16, 1957

At Los Angeles, Calif.
Present: Hon. Peirson M. Hall, District Judge:

Deputy Clerk: S. W. Stacey, Reporter: Agnar Wahlberg, U. S. Att'y, by Assistant U.S. Att'y: Leila Bulgrin. Counsel for Defendant Harvey M. Grossman, Esq. Defendant present in custody.

Proceedings: Hearing on: (1) Motion of defendant to inspect (2) Motion of defendant to quash indictment and or suppress evidence.

Order further hearing.

Filed transcript of proceedings had before Walter H. Odemar, Judge, May 10, 1957.

D. W. Beckman is called, sworn and testifies for government. Beverly P. Grace is called, sworn and testifies for government.

It is ordered that motion to inspect grand jury transcript is denied and further that motions to quash indictment and suppress evidence are also denied.

It is also ordered that trial be set for 10 a.m., July 23, 1957.

John A. Childress, Clerk.
By S. W. Stacey, Deputy Clerk.

[fols. 44-49] IN UNITED STATES DISTRICT COURT

VERDICT—Filed July 26, 1957

We, the Jury in the above entitled cause, agree and find the defendant Guilty as charged in the indictment.

Date July 25, 1957.

Murrary A. Wolfe, Foreman.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 21, 1957

To the clerk of the United States District Court for the Southern District of California, Central Division, and to Laughlin E. Waters, Louis Lee Abbott and Leila F. Bulgrin, attorneys for plaintiff.

You and each of you will please take notice that defendant, Jose Terrones Rios appeals to the United States Court of Appeals for the Ninth Circuit, from the Judgment of guilty entered in the above-entitled cause on July 25, 1957 upon a jury verdict rendered on July 25, 1957.

Name and Address of Appellant.

Jose Terrones Rios.
907 South Concord Street.
Los Angeles, California.

Offense: 21 U.S.C. 174 (One Count).

Verdict of guilty returned on July 25, 1957. Judgment imposing sentence of twenty years imprisonment entered on August 13, 1957.

Defendant is now confined in the Los Angeles County Jail.

Dated: August 19, 1957.

Harvey M. Grossman.
6535 Wilshire Boulevard.
Los Angeles 48, California.

Attorneys for defendant.

[fols. 51-60] Affidavit of Service by Mail thereon.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS TO BE RELIED ON—Filed August 30, 1957

The points upon which Defendant will rely on appeal are:

1. The Court erred in denying defendant's motion to Inspect Transcripts of the Grand Jury Proceedings in the above-entitled cause, which motion was made on the ground that such inspection was necessary for the ends of justice.

2. The Court erred in denying defendant's motion to Quash the Indictment, which motion was made on the ground that said indictment was based solely on evidence illegally obtained as a result of search and seizure, and upon proceedings theretofore had in the State Courts.

3. The Court erred in denying defendant's motion to Suppress Evidence, said evidence consisting of a brown manila envelope and its contents, which motion was made on the ground that said property was illegally seized without warrant, and upon the basis of proceedings theretofore had in the State Courts.

4. The Court erred in overruling defendant's objection to the admission of certain evidence, said evidence consisting of Government Exhibits 1, 1A and 1B, said objection being made on the ground that said property was illegally seized without warrant, and upon the basis of proceedings theretofore had in the State Courts.

5. The Court erred in denying defendant's motion for Acquittal, which motion was made on the ground of pro-
[fols. 62-64a] ceedings theretofore had in the State Courts and the manner in which the evidence relied upon by the Government had been obtained.

6. The Court erred in restricting defendant's right to examine statements by Government witnesses.

Dated: August 28, 1957.

Harvey M. Grossman.
Attorney for Defendant.

Affidavit of Service by Mail thereon.

[File endorsement omitted.]

[fol. 64b] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1-3] IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding.

No. 26019 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

JOSE TERRONES RIOS, Defendant

Reporter's Transcript of Proceedings

Los Angeles, California
Monday, July 15, 1957.

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, Los Angeles 12, California; by Leila Bulgrin, Assistant United States Attorney.

For the Defendant: Harvey M. Grossman, Esq., 6535 Wilshire Boulevard, Los Angeles 48, California.

[fols. 4-5] Los Angeles, California; Monday, July 15, 1957; 2:00 p.m.

COLLOQUY BETWEEN COURT AND COUNSEL

(Other court matters.)

The Clerk: Item No. 9. Case No. 26019, United States v. Jose Terrones Rios.

The Court: Let me see, there are several of these motions. Let us see who is ready.

Mr. Grossman: Ready for the defendant Rios.

[fol. 6] The Court: United States v. Rios.

I have read the affidavit, the transcript of the proceedings on the preliminary hearing, the transcript in the Superior Court and the memorandum filed by both counsel.

You may proceed.

Mr. Grossman: Thank you, your Honor.

May it please the court, I believe it would simplify matters [fol. 7] at the outset if one or two matters may be stipulated to as to which I understand there is no contention at this time factwise.

STIPULATION RE EVIDENCE BEFORE COURT

First I propose the following stipulation: that the Government in the instant case proposes to rely at the trial of this case solely upon the evidence which was before the State court trial judge, Judge Odemar of the State court, and was suppressed by him.

Will the Government so stipulate?

Mrs. Bulgrin: In this case there is no question but what the evidence in the Rios case in this court will be the evidence referred to in the transcript.

The Court: And nothing else?

Mrs. Bulgrin: Nothing but the physical evidence.

The Court: He is asking you to stipulate that your sole evidence will be that.

Mrs. Bulgrin: Well, no, I couldn't stipulate to that, Mr. Grossman.

I will stipulate that the heroin which was referred to in this transcript will be produced at the time of trial and will be offered in evidence.

The Court: And the testimony of the two police officers?

Mrs. Bulgrin: That is right.

The Court: Who testified at the preliminary hearing?

Mrs. Bulgrin: Mrs. Grace and Mr. Beckmann.

[fol. 8] The Court: They will be the witnesses?

Mrs. Bulgrin: That is correct.

The Court: Whether or not you have other evidence you are not disclosing at this time?

Mrs. Bulgrin: To the best of my knowledge at this time we do not. I wouldn't want to preclude myself if I discover that to be the case.

The Court: Will you accept the stipulation which I understand Mrs. Bulgrin says the Government is willing to agree to, that the two police officers will be called as witnesses, who testified in the preliminary hearing, and

that the heroin which was there referred to and secured by the police officers will be offered in evidence?

Mrs. Bulgrin: That is the heroin which is referred to in the indictment filed in this particular case, your Honor, and the only charge in this case.

The Court: Very well.

Mr. Grossman: So stipulated.

The other stipulation I would like to offer before your Honor, if the Government will so stipulate it can obviate the need of one of these motions, and that is as follows: that the sole evidence before the grand jury which returned the indictment in this case connecting the defendant with the alleged offense was the testimony of Officers Grace and Beckman and the evidence which was suppressed in the Superior State Court proceeding.

[fol. 9] I believe in light of Mrs. Bulgrin's statement that this is the only evidence that she is aware of, that the Government may well be willing to stipulate, which will obviate the necessity of getting into the grand jury transcript.

Mrs. Bulgrin: I don't believe that that stipulation would be pertinent here, your Honor.

The Court: Do you decline it?

Mrs. Bulgrin: I will decline that stipulation.

The Court: Very well.

Discussion re Motions

Mr. Grossman: In that event, then, we will proceed on all three motions.

The Court: Three? I thought there were only two.

Mr. Grossman: One is in the alternative. There is a motion to inspect and a motion to quash the indictment or suppress the evidence in the alternative. Actually it is two motions.

The Court: Yes.

Mr. Grossman: The facts of this case are rather simple. Two members of the juvenile department of the Los Angeles Police Department arrested the defendant and

thereafter proceedings were had in the State courts based on a charge of unlawful possession of narcotics.

At the trial of those two proceedings the only evidence before the trial judge——

[fol. 10] The Court: Now, you have attached those to your affidavit and I take it therefore that you are offering those transcripts in evidence?

Mr. Grossman: They are offered in evidence, your Honor.

The Court: Are you offering them in evidence as proof of the facts therein set forth?

Mr. Grossman: For the purpose as proof of the facts therein set forth, for the purposes of the present motion, your Honor.

The Court: What I am trying to get at is whether or not you are depending upon a matter of fact as the basis of your motion that the search and seizure was unlawful, or whether you are just carrying one string to your bow and that is that the State court, having decided that it is unlawful, that that is binding on this court.

Mr. Grossman: Well, if I may restate our position, our position is this, your Honor, that the State court, having held that the evidence was illegally obtained as the result of an illegal arrest and search and is therefore inadmissible under the Cahan decision, that therefore as a matter of law without any additional factual determination by this court it must be accepted.

The Court: Without any consideration of what the facts were?

Mr. Grossman: Without any consideration of the under-
[fol. 11] lying facts other than the ruling.

The Court: Other than the fact that they held that it was unlawful?

Mr. Grossman: That is correct.

The Court: Yes?

Mr. Grossman: That is the sole issue.

The Court: That being so, do you desire to offer the transcript in evidence on behalf of the Government to show, as a matter or fact, that the search and seizure was unlawful?

Mrs. Bulgrin: Your Honor, I will consider two possibili-

ties, either the transcript or the police officers who are present in court. I think perhaps I would like to do so at the present time, that is, with respect to the first transcript only of course.

The Court: There was no evidence in the hearing before the Superior Court except the transcript of the preliminary hearing, is all?

Mrs. Bulgrin: I think for all practical purposes that the transcript could be so used.

The Court: Do you offer that on behalf of the Government?

Mrs. Bulgrin: I will offer it on that limited issue, your Honor. Since the court is trying this motion, if it appears that the court wishes additional facts to determine the matter, I have the police officers here in court. But it may [fol. 12] be that our discussion of the motion will make it apparent that we should have additional evidence.

Mr. Grossman: May I be heard on that?

The Court: Yes.

Mr. Grossman: I object on behalf of the defendant to the offering of this evidence into the record because it is our position——

The Court: You have already put it in the record.

Mr. Grossman: That it be admitted into evidence so that the facts thereof are put into evidence. That is the request that has been made, as proof of the facts therein contained.

The Court: The United States can offer any facts in opposition to your motion which they desire.

Mr. Grossman: May I explain my reason for this objection. It is simply this, your Honor, that we view the law in this matter, the essential issue here, is the fact that the State court has made a determination which, in so much as it is inadmissible under State law, and the applicability of the Cahan decision is final, there is no appeal that has been taken or perhaps could be taken from that ruling, and it is our contention, your Honor, that as a result of that determination of the State court that the Cahan decision precludes the use of the evidence in the State court, that any use of the procedures and processes of this court to permit use of that evidence in a Federal prosecution, leav-

ing aside any question of what might have been the case [fol. 13] if this court had been called upon in the first instance to determine de novo as to the legality of illegality of the search and seizure, that the State court having held that the Cahan decision precludes this evidence that this court may not lend its processes, constitutionally and also as a matter of policy, to any procedure which would sanction a frustration of the State court ruling on this illegal search and seizure matter. And if I might be heard very briefly on that, it really goes in a sense to the heart of one of our principal arguments here.

The Court: That is what I am here for, to hear you.

Mr. Grossman: Very well.

Our position is briefly this, your Honor: Our first point may be simply stated in these terms, that in the case of Wolf v. Colorado, cited in our memorandum, the United States Supreme Court held and stated—this is the majority opinion to which I am referring—that a state may not sanction unlawful searches and seizures, that an unlawful search and seizure is itself a violation of due process, but that in order to determine the methods best suited to prevent such unlawful searches and seizures, such violations of due process, the states have a degree of latitude.

Now, prior to the Cahan decision, California did not adopt the procedure which the Federal courts adopted under the Weeks decision in excluding evidence so illegally [fol. 14] obtained as the means of preserving the rights against searches and seizures which are unlawful.

However, in Cahan the California Supreme Court came to the conclusion that in order to give any real substance against unlawful searches and seizures, a right which has been protected against by the Fourteenth Amendment to the Federal Constitution, that it was necessary for the California courts to adopt the same procedure used in the Federal courts, namely, the exclusionary rule of evidence.

Now, in so doing we have dual sovereignties with a common policy designed to achieve a common result in preventing an infringement of constitutional rights.

Now, in the instant proceeding the State court has held that under Cahan, the applicable State authorities, this

evidence was unconstitutionally seized and is therefore inadmissible. This has been determined as far as the State is concerned.

Now, if Cahan is to have any meaning and if the State is to be permitted to preserve the constitutional right against search and seizure by the methods which the State and Federal governments have found to be the only means of so doing, it is essential that the Federal Government not lend its offices to a circumvention of Cahan, saying, granted California is trying to prevent unlawful search and seizure, and they are seeking to do it in the very method by which the Supreme Court of the United States has indicated will [fol. 15] be done in the Federal courts. But in spite of this we, as the Federal courts, are going to sanction a circumvention of that rule by resort to the fact that there happened to be dual sovereignties, dual sovereignties with a common policy on this matter.

Now, my position, your Honor, is simply this: If the Federal court is to lend itself to a circumvention of Cahan and thereby, in effect, frustrate the State's attempt through Cahan to provide an effective procedure for preventing infringement of constitutional rights against unlawful searches and seizures, then the Federal courts themselves will be violating the right to due process under the Fifth Amendment to the Constitution as well as the provision of the Fourth Amendment dealing with searches and seizures, in that they will by sanctioning and abetting a violation of the Fourteenth Amendment or a circumvention of the Fourteenth Amendment, and preventing the states from protecting rights under the Fourteenth Amendment, that the Federal courts themselves will be depriving the defendant of his constitutional rights and that, furthermore, aside from the constitutional aspects, simply as a matter of policy as well as of constitutional level, it is rather absurd for the Federal Government to say to a state which adopts the Weeks rule, very well, you didn't have to adopt this rule but you have adopted it as a means of protecting the constitutional right against unlawful searches and seizures; [fol. 16] now having adopted that rule we are going to insist in frustrating you, albeit, I dare say, that if the situation were reversed, certainly as a matter of policy, the

Federal courts would certainly presumably be aghast if California, for example, were to encourage circumvention of the Federal search and seizure rule by saying, well, Federal officers can come in here and testify.

Now, it is our position, briefly, your Honor, that at the constitutional level, and also at the policy level, that this court should not sanction an evasion of Cahan and prevent the state from committing unlawful searches and seizures by the means which they have chosen to be effective . Granted they might not have chosen that means under the Wolf decision, but having chosen that means as the only effective means of vindicating a constitutional right against unlawful searches and seizures, I respectfully urge that this court should not lend its offices to frustrating that policy, particularly when to do so would be to frustrate a policy which California now shares with the Federal courts in this area.

Now, the Government has cited cases in its memorandum. I had an opportunity to examine this memorandum and I note they cite three cases there. None of these cases, if the court please, involve situations where the State court had had proceedings determining the illegality of the other.

Now, certainly it is one thing to say——

[fol. 17] The Court: But they proceeded on the assumption that the searches and seizures in those cases were illegal.

There are two cases in the Ninth Circuit—I have forgotten the names of them——

Mr. Grossman: The Parker case is the only Ninth Circuit case in point, but there is the Jones case and one other in another circuit that I would like to cite in answer to those cases. There are two distinguishing factors present in those cases.

Now, first of all, in none of the cases was the point we are contending for here raised, namely, that this was a situation in which the evidence was inadmissible in the State court and consequently there would be a frustration of the dual policy here that is involved here.

A reading of these opinions indicates that this was not raised in any of them. The sole contention raised was as to questions of participation, and so forth, which are not involved here.

And, secondly, in none of those cases did we have a State court holding that the evidence would be inadmissible under its rule of exclusion. Therefore by clearly indicating that any action by the Federal courts would be frustrating a decision of the State courts attempting to apply the state exclusionary rule.

That is precisely what is involved here. Certainly it is [fol. 18] one thing for a Federal court to say, we will not in the matter of the first instance consider questions as to whether this was illegal or not under the State procedure, because once the states make that determination then there is a question of a direct frustration of the State decision on the search and seizure point by the Federal court that wouldn't be involved otherwise. And, in addition, your Honor, none of these cases—and I don't believe the Government could find one, they certainly haven't cited any—raise the proposition I am addressing myself to.

I might say, your Honor, that I am informed it was raised, that one phase of this matter was raised, namely the question of the effect of the Cahan decision was raised in a decision before Judge Mathes a few weeks ago, in which I understand Mrs. Bulgrin here was trial counsel, and after discussing the case with Mrs. Bulgrin I am sure she will not dispute this.

Mrs. Bulgrin: That was the Proctor and Hall cases, your Honor. Mr. Bender was there.

The Court: Did you get a writ in the Daniels case?

Mr. Graves: At the present time we have asked for the record to be prepared, and I have been running down my points to see whether or not I am going to have sufficient grounds to get a writ. I have been reading the authorities to see whether or not there is an equitable ground to go up on there because they don't normally permit it and they [fol. 19] were not accepting appellate jurisdiction. However, I think I might make it.

The Court: If not, I believe that the denial of this motion is now appealable, is it not?

Mr. Graves: I understand there is no interlocutory appeal to the denial of this motion.

The Court: The United States may appeal.

Mr. Graves: That is correct.

The Court: Is that your position?

Mrs. Bulgrin: You mean from an interlocutory order?

The Court: Either party may appeal from a motion to suppress.

Mrs. Bulgrin: Apparently that was the Government's position, that the defendant could appeal from the judgment if the motion were denied during the course of the trial.

But the Government could appeal from the order itself granting the motion in a narcotics case.

Mr. Graves: It might be better procedure, your Honor, if your Honor granted this motion so that it would not have to be appealed by the Government and then set our case over for trial.

The Court: That might be good procedure for you, but I cannot bring myself to do that consistent with my oath. I must decide it according to the way I think it ought to be decided and let everybody take whatever procedure is open to him.

[fol. 20] Mr. Grossman: May it please the court——

The Court: I think, as I said to Mr. Graves the other day, counsel, I think I am bound by the Ninth Circuit case and the other case in connection with this matter. In the other case, it was a situation where the state had had a search and seizure, had had a preliminary hearing, the man was bound over, they tried it and the court dismissed it on the ground of unlawful search and seizure. In other words, the identical legal point was present there as here, and it was argued very competently, but I felt bound by this Ninth Circuit case and the other case—I have forgotten the name.

Mrs. Bulgrin: The Parker case.

The Court: There were three cases.

Mrs. Bulgrin: Parker, Anderson and Lustig.

The Court: So it seems to me that I am still of the same opinion.

Mr. Grossman: May I suggest one fact to the court? I would like to call one other matter to the court's attention, if I may.

The Court: Yes.

Mr. Grossman: I believe it is unfortunate that at the time this court had a reconsideration of the Daniels case which had previously been decided by Judge Mathes, that it was not called to the court's attention, that is, subsequent to the original proceeding before Judge Mathes. I think [fol. 21] there was a later proceeding before him which led to a motion for reconsideration. But I mean subsequent to a decision by Judge Mathes a point came up before him in the Proctor and Hall case in which Mrs. Bulgrin represented the Government, and in this subsequent decision, although I believe Judge Mathes at the outset may have shared the view which your Honor has indicated, that after considerable argument during the proceedings, which lasted a day and a half or two days, Judge Mathes held that in light of the Cahan decision which adopted the exclusionary rule, and relying upon the case of United States v. Gambino, I believe was the principal authority—perhaps some other authority—he held that where evidence is inadmissible in the State court proceedings that it might not be under the exclusionary rule or other appropriate rule, that that evidence may not be admitted in a Federal court proceeding, and in so ruling he distinguished the cases that are cited by the Government, saying that none of these were applicable on the ground that, as far as I am aware, none of these involve situations where the State court, where the exclusionary rule was present, and this point was raised.

Now there are a couple of cases that the Government has here—I don't know whether they were cited before Judge Mathes or not—but they are cases likewise where the Government suggests a possibility of excludability under the State court law, but there is certainly no intimation that [fol. 22] that point was raised in any of these cases. And I submit, your Honor, at the time the Government argued that case before Judge Mathes a few weeks ago, he did so rule, and I submit that the decision reached by Judge Mathes after further reflection should likewise be the decision of this court, namely, that in light of the Cahan decision and the frustration of that decision which would result, the evidence should not be admitted in this court as a means of frustrating the policy, regardless of the applicability of the "silver platter" doctrine where this point isn't involved or isn't raised.

I submit that the Government still to this day cannot cite a single case where that point has been ruled upon by any court of appeals' decision whatever.

The Court: Neither side can.

Mrs. Bulgrin: That is correct, I think, your Honor.

I might say that counsel was inadvertent in referring to the Proctor and Hall case, your Honor, as being decided subsequent to the decision which Judge Mathes gave in the motion to suppress in the Daniel case. That Proctor and Hall case was tried by myself before Judge Mathes and it was before the Daniel case in which Judge Mathes ruled upon a motion.

The Court: I do not have the facts or the information on the Proctor and Hall case.

Mrs. Bulgrin: Well, it was preceding rather than subsequent.

[fol. 23] The Court: I take it there may have been some ground of distinction in his mind.

In any event——

Mr. Graves: May I address the court before your Honor rules?

The Court: Yes.

Mr. Graves: If your Honor pleases, may I appear for the purpose of amicus curiae for the purpose of one statement?

The Court: Yes.

Mr. Graves: Your Honor, as I understood your Honor the last time I appeared before this court and argued this same point, you expressed some concern about whether this should not be passed on by the Circuit Court, that it involves a serious question of law enforcement policy.

The Court: It does.

Mr. Graves: That being the case, I think you should take into consideration that many defendants may be forced to a trial if there is no provision for a writ of mandamus, which seems to them difficult, and I going to actually have to expound theories to get there as I understand the present rules.

That being the case——

The Court: I do not know, the Ninth Circuit Court of Appeals have used the extraordinary writ power in some

most extraordinary manner, and entirely beyond my comprehension as to where they get the power, but they have said so and that is it.

[fol. 24] Mr. Graves: I am a little bit afraid of some of the very recent Supreme Court decisions which seem to indicate that they should and may only correctly exercise it in aid of their appellate jurisdiction, and that when the defendant can appeal from the judgment, that they should not exercise the prerogative of the writ power.

That being the case, many defendants may be forced to trial, all of them having to go through the procedure of the record cost, bail cost, going to custody pending outcome, and all that that entails.

The Court: That is right too, but on a proposition of this kind I cannot consider convenience. It is a matter of justice, and in my view it is a matter of what the law is. I have got to ascertain the law is I see it and as I can declare it regardless of whether it is convenient or what would be the easiest way to get it settled.

I would like to see it settled quickly by the appellate court because the question is bound to arise, not only in California, in this district, and in every narcotic case, because so far on my calendar there will be a motion to suppress in every narcotics case. Hasn't that been true, Mr. Abbott?

Mr. Abbott: Well, certainly by far the greatest number, your Honor. It must be close to all.

The Court: I suppose pretty soon in every case there will be a motion to suppress, whether they have a good [fol. 25] ground or not they will make a motion to suppress, in order to protect the record.

Mrs. Bulgrin: Your Honor, I think it might be of interest, that that case which I tried the motion was made in the middle of the trial and I didn't have a chance to present the case that you mentioned to Judge Mathes. So we were laboring somewhat under difficulties.

The Court: In any event, so far as Mr. Grossman's point that the evidence should be suppressed because the State court, the instrumentality of the State authorized to rule on it, has held that it was unlawful under the State law and that therefore this court must hold that the search and seizure was unlawful, I will hold that your point is not well

taken and I feel bound by the three cases which I mentioned a little while ago.

Now, that does not mean the end of your motion. If you wish to proceed on the factual basis and call the defendant or call whatever witnesses you have here, I think that that being the case the matter stands in the posture where I must decide as a question of fact whether or not the search and seizure was unlawful.

Mrs. Bulgrin: And, secondly. I would say whether there was any Federal participation.

The Court: It covers the whole gambit of whatever can be introduced.

[fol. 26] Mr. Grossman: May I be heard on the second phase?

The Court: Yes. Now you have not argued the motion to secure the transcript of the grand jury proceedings.

Mr. Grossman: No, your Honor. Would you prefer to have that motion argued prior to the other phase of this other motion, that is, prior to the question of whether factually there was an illegal search and seizure here? Would you prefer to have the question as to the grand jury transcript argued first? I am prepared to argue that at the present time, if the court please.

The Court: I do not know that it makes much difference. The motion to secure the grand jury transcript is on the ground of a motion to quash.

Mr. Grossman: That is correct.

The Court: It is in support of your motion to quash.

Mr. Grossman: That is correct.

The Court: And the ground of your motion to quash is that there was an illegal search and seizure.

Mr. Grossman: That is correct.

The Court: So you come right back to the same point.

Mr. Grossman: That is correct, your Honor.

The Court: So I think that we would perhaps proceed, if you desire—I mean if you desire to stand on the record as you now have it; you may want to do so—but if you desire to proceed on the factual basis you may do so.

[fol. 27] Mr. Grossman: I would like to make it clear for the record that in urging the second point the defendant is not waiving any rights he may have under the first phase

of this, namely, the question as to whether this factual matter could properly be determined by this court.

The Court: I quite understand that.

Mr. Grossman: Very well. With that express reservation, then, your Honor, I would like to state that insofar as the factual background of this is concerned, the defendant is quite content to accept what the Government referred to previously.

The Court: It is your move now to put the facts on, if you desire.

Mr. Grossman: Very well, your Honor.

At this point, in connection with this second phase of our motion——

The Court: That is to say, for my determination as to whether or not, in fact, it was a lawful search and seizure.

Mr. Grossman: That is correct, your Honor.

The Court: Yes?

Mr. Grossman: With the aforementioned reservation, I would like to offer in evidence before the court as a statement of the facts therein contained for purposes of this motion the transcript of the testimony of the police officers, and I call the court's attention to the fact that this is the [fol. 28] testimony of the arresting officers themselves in the State court proceedings, upon the basis of which the State court ruled that there was an illegal arrest and an illegal search and seizure.

And I would like very briefly, if I may, to address myself to that phase of our motion.

The Court: Is there any objection to the introduction of that transcript?

Mrs. Bulgrin: That would be of the preliminary transcript, your Honor?

The Court: The transcript of the preliminary hearing which was held before the Superior Court obviously when the defendant was bound over.

Mrs. Bulgrin: No, your Honor.

The Court: Very well. It is admitted.

(The transcript referred to was received in evidence as an exhibit, but not numbered.)

The Court: Is it stipulated between the parties that if the same questions were asked of the witnesses there produced the answers would be the same?

Mr. Grossman: It is so stipulated.

Mrs. Bulgrin: So stipulated.

The Court: Very well.

Mr. Grossman: Now, essentially the testimony of the officers, principally Officer Beckmann, was to the following [fol. 29] effect——

The Court: Just a moment, counsel. I am wondering whether or not you would be able to conclude this matter today.

Is it your intention to produce the police officers in addition, or do you know?

Mrs. Bulgrin: No. It would just depend on how the argument goes. Mr. Beckman is present. It may be that the transcript will be sufficient. However, I have him present and we may request leave of court to put him on as a witness. He can return at another time if the court wishes to recess now.

The Court: Is this case set for trial?

Mrs. Bulgrin: It is set for trial next Tuesday, July 23rd.

Mr. Grossman: I would think if it would delay the motion proceedings that it might be available to have the trial date advanced accordingly.

Mrs. Bulgrin: The Government feels it is a rather simple case factual and I don't think any determination made this week, or even on Monday, should affect the date of trial.

Mr. Grossman: It would subsequently affect the subsequent proceedings, or the course taken by the defendant in preparing his defense. I believe it would be desirable to have the trial date vacated.

[fol. 30-31] The Court: I will continued this matter until tomorrow morning for further proceedings and you be prepared to advise me whether or not you expect to introduce any additional evidence.

Mrs. Bulgrin: I will do so.

The Court: That is, either side.

Mr. Grossman: Yes, your Honor.

The Court: Very well.

(Whereupon, at 4:05 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, July 16, 1957.)

[fol. 32] Los Angeles, California; Tuesday, July 16, 1957; 10:00 a.m.

(Other court matters.)

The Court: We will take up the Rios matter now. I do not know whether we are going to finish by noon or not.

Are you ready in your case?

Mr. Grossman: Yes.

The Court: You offered in evidence the transcript?

OFFER IN EVIDENCE

Mr. Grossman: The transcript was offered in evidence.

The Court: It is admitted. That is the transcript of the preliminary hearing of March 12, 1957, before Judge Kaufman.

Mr. Grossman: I would like to clarify one thing at this time as to the stipulation, your Honor.

It is my understanding the Government has stipulated that it intends to use the evidence that was the basis of the State court action in these proceedings in this case.

Mrs. Bulgrin: I think the stipulation was made yesterday, and I think we worked it out to the satisfaction of both counsel, your Honor, with respect to the hearing.

The Court: As I understand, the Government has stipulated that you do expect to use this evidence but you decline to state that you will use only this evidence.

Mrs. Bulgrin: That is correct, your Honor. That was the gist of the stipulation.

[fol. 33] The Court: Very well.

Mrs. Bulgrin: And I believe also, your Honor, that the moving party offered the second transcript (I am not sure) in connection with the legal argument, and the Government offered the preliminary transcript, the transcript of the preliminary hearing on the facts. So both transcripts are in evidence, I believe.

The Court: The moving party here on the legal argument as to his motion offered the transcript of the hearing in the Superior Court which was more or less a ruling by Judge Odemar.

Mr. Grossman: Yes, your Honor.

The Court: And when I did not sustain you in that posi-

tion, the moving party has offered the transcript of the preliminary hearing, and it is in evidence.

Mrs. Bulgrin: That is correct.

Mr. Grossman: Yes, your Honor.

The Court: And you rest with that?

Mr. Grossman: We rest with that.

The Court: Very well.

Do you have any evidence to offer, Mrs. Bulgrin?

Mrs. Bulgrin: May I inquire, is the transcript of the Superior Court hearing also in evidence? Was that also offered by the moving party?

The Court: Is was offered for a limited purpose.

[fol. 34] Mrs. Bulgrin: That is what I understood.

The Court: Now you offer it for every purpose, for all purposes?

Mr. Grossman: No. If the court please, both transcripts are offered in evidence for that limited purpose, that is, the preliminary transcript is offered in evidence for the purposes of the present motion at the factual level to which we alluded yesterday. I don't believe the other transcript contains any additional evidence.

The Court: It does not contain any evidence at all, except it is evidence of the fact that the Superior Court ruled. That is all.

Mr. Grossman: I believe that was already brought to the court's attention.

The Court: Anyhow, I will admit both transcripts in evidence.

(The transcripts referred to were received by the court as evidence.)

The Court: You may proceed.

Mrs. Bulgrin: I would like to call Mr. Beckmann to the stand, please.

[fol. 35] D. W. BECKMANN, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full.

The Witness: D. W. Beckmann; B-e-c-k-m-a-n-n.

The Clerk: Your address?

The Witness: 1239 North Everett Street, Glendale.

Direct examination.

By Mrs. Bulgrin:

Q. Mr. Beckmann, please give us your occupation.

A. I am a police officer of the City of Los Angeles, assigned to Georgia Juvenile.

Q. During February 1957 what detail in that division were you assigned to?

A. To the Georgia Juvenile in the Central Division.

Q. Does that involve work on narcotics cases?

A. Yes.

Q. Now, Mr. Beckmann, have you had an opportunity to read over the reporter's transcript of the preliminary hearing for Tuesday, March 12, 1957, which has been received in evidence and which was attached to the affidavit of Joseph T. Forno in this particular case, 26019?

A. Yes, ma'am.

Q. Mr. Beckmann, are you the officer who testified in that case?

[fol. 36] The Court: I understand there was a stipulation yesterday that if the same questions were asked of these witnesses at this time the answers would be the same.

Mr. Grossman: So stipulated.

Mrs. Bulgrin: So stipulated.

Q. Now, you are the officer who testified at that time, are you not, Mr. Beckmann?

A. Yes.

Q. I would like to ask you a few additional questions. During the time of the events which are testified to, which occurred on February 18, 1957, in connection with the defendant Rios in this Federal case, did you have any contact at all with any Federal officers with respect to the

arrest which you made and the transactions which you testified to?

Mr. Grossman: That is objected to.

The Court: Prior to the arrest?

Mrs. Bulgrin: Prior to the arrest; yes, your Honor.

Mr. Grossman: I wanted to have clarified the time to which she was addressing that question.

By Mrs. Bulgrin:

Q. Did you have any contact with Federal officers in that regard prior to the time you first saw the defendant on that evening around 10:50 p.m.?

A. No.

Q. To your knowledge, Mr. Beckmann, were there any [fol. 37] Federal officers in the vicinity of First and State Streets where this transaction took place prior to the time this transaction took place?

A. None that I know of?

Mr. Grossman: That is objected to on the ground it would be a conclusion of the witness.

The Court: She is just asking if he knew. He said he did not know.

By Mrs. Bulgrin:

Q. In connection with your work as a police officer, Mr. Beckmann, in the Police Department of Los Angeles, have you ever worked with Federal officers at all on narcotics cases?

A. No.

Q. Have you ever worked with any Federal officer in connection with your duties in the vicinity or the area at First and States Streets?

A. No.

Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case [fol. 38] with him.

He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

Q. Whose idea was that? Was that yours or Captain Madden's?

A. Mine.

Q. In other words, did you institute the discussion with Captain Madden?

A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him.

Q. One more question with respect to the Exhibit in this preliminary hearing—I believe it is described on the first or second page here—was the exhibit which was involved in that hearing the same article that you picked up off of a taxicab floor, Mr. Beckmann?

Mr. Grossman: Objection, your Honor. This is a conclusion of the witness. This witness didn't testify he picked it up.

Mrs. Bulgrin: I am sorry. That was my mistake.

[fol. 39] Q. Mr. Beckmann, if I may change the question to fit the facts, was the exhibit which is involved in the preliminary hearing the same object which was handed to you by Policewoman Grace on the night of February 18th after you had seen the defendant Rios?

Mr. Grossman: Objection. These questions have already been asked and this testimony elicited in the preliminary hearing.

The Court: I do not recall that particular question.

By Mrs. Bulgrin:

Q. What was your answer?

A. Yes, that was the same object.

Q. Now I would like to ask you a couple of more questions, Mr. Beckmann.

I believe you testified, if I am correct, that you saw the

defendant Rios throw the object which I have just described to you on the taxicab floor, is that correct?

A. He dropped the object.

Q. Now will you tell us exactly all that you did before you saw him throw that object on the floor of the taxicab?

The Court: Is that not covered in here?

Mrs. Bulgrin: I am not quite sure, your Honor. I wanted it to be definite.

The Court: He stated as follows in the preliminary hear-
[fol. 40] ing:

"Q. What did you do, sir?

"A. I appraoched the cab on the right side, with my badge in my left hand and my flashlight in my right hand, and I identified myself to the cab driver and also to the defendant who was sitting in the rear seat.

"Q. What happened at that time?

"A. When I identified myself to the defendant he reached in his jacket pocket, a blue jacket, and dropped a white object on the floor.

"Q. On the floor of the cab?

"A. Yes.

"Q. And did your partner come up by this time?

"A. When he dropped the white object on the floor I jerked the door open and the defendant alighted from the cab.

"Q. What happened next?

"A. When he alighted from the cab I told him he was under arrest for suspicion of narcotics, and grabbed him by the arm."

Mrs. Bulgrin: May I rephrase my question?

Q. In view of the court's reading from the exhibit, Mr. Beckmann, is that all that happened up to that point, to the best of your recollection?

[fol. 41] The Court: All that happened at First and State Streets?

Mrs. Bulgrin: Yes.

The Witness: Yes. That is what happened at First and State Streets.

By Mrs. Bulgrin:

Q. Now, let me ask you one further question in that respect: As the defendant Rios threw the object to the floor of the taxicab, will you describe——

Mr. Grossman: I object.

Mrs. Bulgrin: May I finish?

Mr. Grossman: You used the term "threw." His testimony is "dropped." This has happened two or three times. I believe the witness himself corrected you once before.

By Mrs. Bulgrin:

Q. Let me use the word "dropped." Will you describe the article that fell to the floor?

The Court: No. He said here that he dropped a white object on the floor. That is what he testified to.

By Mrs. Bulgrin:

Q. Will you describe what object the defendant Rios dropped to the floor of the taxicab, please, Mr. Beckmann.

A. When he took the white object out of his pocket, he took it out of his right jacket pocket, and dropped it to the floor of the cab.

I observed him drop the object to the floor of the cab [fol. 42] and shined my light on the object. When I shined my light——

The Court: What was it?

The Witness: It appeared to be a white rubber.

The Court: A condom?

The Witness: Yes.

The Court: Commonly referred to as a contraceptive?

The Witness: Yes, sir.

By Mrs. Bulgrin:

Q. What did it appear to be filled with?

A. With a white powdery substance.

Q. By the way, in connection with your duties had you seen objects of this similar type before?

A. Yes.

The Court: Is that a common method used by heroin pedlars to carry heroin?

The Witness: Yes, sir.

By Mrs. Bulgrin:

Q. Have you been assigned previously to this time to any areas in Los Angeles which are known to the Police Department to be frequented by traffikers in the heroin trade?

Mr. Grossman: Objection, your Honor.

The Court: I think that calls for a conclusion of the witness, "known to the Police Department." I think he can testify as to what he knows the general reputation of the vicinity is.

[fol. 43] Mrs. Bulgrin: Let me ask this question, then:

Q. Are you familiar with the general reputation of the vicinity surrounding First and Flower Streets with respect to the narcotics trade, and particularly the traffic in heroin?

A. Yes.

Q. Will you tell us what the reputation is?

A. First and Flower, which is near Temple and Figueroa, is second only to Fifth and Stanford in narcotics activity.

The Court: Is it bad?

The Witness: It is bad.

Mrs. Bulgrin: I believe that it all.

The Court: Is that one of the places which you keep under surveillance in connection with your duties, First and Flower?

The Witness: Yes, sir.

Mrs. Bulgrin: I believe that is all, your Honor.

The Court: Cross examine.

Cross-examination.

By Mr. Grossman:

Q. Officer Beckmann, during the nine-month period prior to the arrest on the 18th of February in this case, approximately how many narcotics arrests had you made—I think you testified to 22—how many of those arrests had you made in the vicinity of First and Flower?

A. Most of them.

[fol. 44] Q. Do you operate customarily out of the area of First and Flower?

A. That is the area I was assigned to, yes.

Q. In other words, you operate within that area and if there were narcotics offenses going on in some other part of the city that wouldn't be within your assigned area, is that correct? You customarily stay in the vicinity of First and Flower and your experience is primarily confined to First and Flower, is that correct, Officer Beckmann?

A. When I am assigned to that particular area on that particular night, it is.

Q. There have been appreciable periods of time prior to the arrest during which you were assigned to that particular area, is that correct?

A. Yes.

Q. Now, you testified that you are a juvenile officer. Isn't it a fact, Officer Beckmann, that the Los Angeles Police Department has a narcotics division?

A. Yes.

Q. And the function of that department or division, I presume, is to deal with narcotics cases, is that correct?

A. Yes.

Q. Now, the defendant whom you arrested in this case does not appear to be a juvenile, does he?

A. No, he does not.

[fol. 45] Q. At the time you first saw the defendant he didn't appear to be a juvenile, did he?

A. No, he did not.

Q. Nevertheless you proceeded to follow him, and, according to your testimony, make the arrest, and so forth, as testified to at the preliminary hearing, is that correct, Officer Beckmann?

A. Yes, sir.

Q. Now, of the arrest which you made in the area of First and Flower, a large number of those arrests are juvenile arrests, aren't they?

A. No. Most of them are adults.

Q. Now, going back to the events of February 18th, you testified at the preliminary hearing as to your following the taxicab for about two miles, as I recall, and this was because you had once before on one previous occasion

arrested a narcotics defendant entering a cab. When you followed this cab were you in a police car at the time?

Mrs. Bulgrin: Your Honor, I think now counsel is going into the information in the transcript.

Mr. Grossman: I am simply attempting to indicate the time to which I am referring.

Q. Were you at the time of the transaction on February 18th using a police car?

A. Yes, sir.

[fol. 46] Q. An officially marked police car, that is, one that was marked? I am not speaking of one that was owned by the Police Department.

A. How do you mean, "was marked"?

Q. We all know a police car has certain markings.

The Court: No, I do not. They use all kinds of cars.

By Mr. Grossman:

Q. Did it contain any identifying insignia to indicate it was a police car?

The Court: You mean on the outside?

Mr. Grossman: On the outside.

The Court: There is no law requiring that. There is a law requiring traffic cars, or there used to be.

Mr. Grossman: I think that the circumstances of the defendant's conduct, or alleged conduct, would have to be considered in light of all the circumstances.

The Court: Your question is, whether or not the car in which he was riding had any visible insignia on the outside?

Mr. Grossman: Had any visible insignia on the outside; that is right.

The Court: Which would indicate it was a police car?

Mr. Grossman: That is correct.

Q. Did it, Officer Beckmann?

A. No.

Q. Were you in uniform at the time?

[fol. 47] A. No.

The Court: You were operating in plain clothes?

The Witness: Yes, sir.

The Court: And your companion?

The Witness: Policewoman Grace was also in plain clothes.

By Mr. Grossman:

Q. At the time you approached the taxicab, as you testified at the preliminary hearing, did you have any object in your left hand?

A. When I approached the cab, yes.

Q. What was that object?

A. I believe I had my badge in my left hand, my flashlight in my right hand.

Q. You testified that you identified yourself. How did you identify yourself?

A. I first identified myself to the cab driver. I didn't want him to take off.

Q. By "identifying" what do you mean by identifying yourself? I just wanted to clarify that. What do you mean by identifying yourself.

A. I shined my flashlight on my badge and told him I was a police officer.

Q. Now, isn't it a fact that at the time you testified you saw the defendant drop an object on the floor of the cab, [fol. 48] that this was at the time you were identifying yourself and that your flashlight at that time was being used in connection with this identification process, Officer Beckmann?

A. No.

Q. Will you describe just briefly the chronology of events at the time as you identified yourself. You testified that you saw an object drop to the floor. You say it was a white object.

Mrs. Bulgrin: Your Honor, I think we are going into the transcript again.

The Court: Yes, I think we are, but you can cross examine on it.

By Mr. Grossman:

Q. You testified this was at 10:50 at night. I assume that it was dark.

The Court: Are you withdrawing the previous question?

Mr. Grossman: No. I was going to lead up to it.

The Court: You are trying to get at what the sequence of events was when he came up to the cab?

Mr. Grossman: Yes.

Q. You say you approached the taxicab and identified yourself. Would you indicate the events that transpired after that?

A. After identifying myself, my main concern was the defendant.

[fol. 49] Q. To whom did you identify yourself, to the cab driver?

A. I identified myself to the cab driver and it was quite clear that I was also identifying myself to the defendant.

Q. The cab driver was in the front and the defendant was in the rear, but you only flashed and showed your badge to the cab driver, is that correct? I mean you may have intended to show it to both?

The Court: Let him answer.

Mr. Grossman: Excuse me.

The Witness: I exposed my badge in such a way that both could see it, both the defendant and the cab driver.

By Mr. Grossman:

Q. What happened following this identification, as you testified?

A. When I identified myself I was watching the defendant. At that time I saw the defendant reach in his right jacket pocket and drop an object on the floor.

Q. In other words, at the time you approached the cab driver you didn't look at the cab driver, you were identifying yourself to the cab driver and looking at the defendant and you saw him drop something on the floor, is that your testimony?

A. I looked at the driver of the cab, as I remember. [fol. 50] I also looked at the defendant. The sequence of events were such that I looked at the cab driver and identified myself to the cab driver and the defendant at the same time.

The Court: This all happened almost simultaneously?

The Witness: Yes, sir.

By Mr. Grossman:

Q. Where were you standing at the time this identification took place in relation to the taxicab?

A. I believe in the middle of the vehicle on the right side, which would be where the back door and the front door come together, nearly meet. That would be approximately by the front seat on the right side.

Q. In other words, by the door post partitions of the front and back?

A. Yes.

Q. And you say you used this as a means of identifying yourself to the cab driver, whom I presume was sitting on the left side of the front seat of the cab?

A. Yes, sir.

The Court: Obviously we are not going to be able to finish this this morning.

Do you expect to call Policewoman Grace?

Mrs. Bulgrin: I had hoped to.

The Court: Very well. We will continue at 2:00 o'clock. You can return at 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 2:00 o'clock of the same date.)

[fol. 51] Los Angeles, California; Tuesday, July 16, 1957; 2:00 p.m.

(Other court matters.)

The Court: We will continue with the Rios matter. I think Officer Beckmann was on the stand.

D. W. Beckmann, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Cross examination (Continued)

By Mr. Grossman:

Q. Officer Beckmann——

The Court: By the way, the record will show the defendant is present in person and by counsel, and was throughout the proceedings this morning.

Mr. Grossman: Yes, your Honor.

Q. Officer Beckmann, have you ever turned over evidence in a narcotics case to the Federal officers prior to the arrest in this case?

The Court: What is the materiality of that?

Mr. Grossman: The Government on direct introduced evidence to show his overall course of dealing, as to whether he had any dealings with Federal officers, whether there was any partcipation.

The Court: In this case.

Mr. Grossman: I think that a question of a course of [fol. 52] ——is material. One of the theories on which we are proceeding here would be that in doing this he was acting as an agent for the Federal authorities, and it is our position that this would be material to determine whether he was in the custom of gathering evidence for the Federal authorities, indicating for whom he was acting in this particular case.

Mrs. Bulgrin: Your Honor, I think if he was not acting in behalf of the Government in this particular case, if he had been so acting, assuming for the sake of argument, in the past, in other cases, it would not be material.

The Court: I do not think it would be material. Since I raised the objection myself, I will sustain the objection.

Mr. Grossman: Very well, your Honor.

Q. Is it not a fact, Officer Beckmann, a condom is a rather common object in the area of First and Flower, aside from any question of narcotics? In other words, this isn't something that is identified solely as a container for narcotics?

It has other uses and is frequently found in this area, is that not correct?

Mrs. Bulgrin: Your Honor, I think that should be objected to.

The Court: That is a rather involved question. You asked whether or not it has other uses and is frequently found in this area. I think your question is complex and compound.

[fol. 53] Mrs. Bulgrin: I would like to make my objection on that ground, and also in this particular case that it was not found by itself. Although it has other uses, it was not found by itself; it was filled with a white powdery substance, and the facts don't support his question.

The Court: That objection is sustained. You may break your question down.

By Mr. Grossman:

Q. Is a condom a common object in the area of First and Flower?

Mrs. Bulgrin: I will make the objection on the ground that in this case it was filled with a white powdery substance.

The Court: The question to me is not understandable. It does not bear any relevancy.

You ask, is it a common object at First and Flower. Do you mean to be found in automobiles full of white powder, on the street, or what?

Mr. Grossman: May I explain my question to the court?

On direct examination this witness testified that this is an object frequently used as a container for narcotics, and I am simply attempting to point out that seeing this object would not necessarily indicate any narcotics because it is frequently used for other purposes, and I was simply attempting to bring out that fact.

I think in light of the question asked on direct examina-[fol. 54] tion as to the identification of the container with the particular contents that this question is pertinent.

The Court: I do not know. I should imagine that the other purposes to which it might have been put should not be in the presence of a policeman and a policewoman.

Mr. Grossman: I was not going to get into that phase, simply the question of the frequency. In other words, this is a common object in that neighborhood.

The Court: Whether or not it is found on the street or what?

Mrs. Bulgrin: I would still object to that.

The Court: Or in public places?

Mr. Grossman: Yes.

The Court: Very well. Direct your question to that, then.

By Mr. Grossman:

Q. Is this the sort of an object that would be frequently found——

The Court: In public places?

Mr. Grossman: I believe it was found in the possession, or allegedly found in the possession, of the defendant, your Honor.

The Court: It was found on the——

Mrs. Bulgrin: Taxicab floor.

Mr. Grossman: He claimed he saw the object dropped, your Honor.

[fol. 55] Mrs. Bulgrin: Your Honor, I would still object to the question, not to belabor the point, but the facts are that it was found filled with a substance.

The Court: Objection sustained.

You are entitled to ask him whether or not it is a common object found in public places abandoned in the vicinity of First and Flower, if he knows.

Do you know?

The Witness: No, I don't, sir.

By Mr. Grossman:

Q. Now, getting back to the circumstances connected with the arrest, you testified at the preliminary hearing that you saw a white object. Was the container itself a white object? Was this a white container?

A. Yes.

The Court: Was this a condom or a toy balloon?

The Witness: A condom.

By Mr. Grossman:

Q. In other words, the object itself was white?

A. It was light-colored.

Q. White color, that is correct.

Mrs. Bulgrin: Excuse me, your Honor. I think the witness said "light color" rather than "white color." I would like to have the record read.

[fol. 56] Is that correct?

The Witness: Light.

By Mr. Grossman:

Q. In other words, when you testified as to a white object you did not mean it was a white object, is that your testimony now?

The Court: He said it was a light object. I do not think that they come in colors or stripes.

Mr. Grossman: I don't know to what extent the court is going to take judicial notice of any of these things——

Q. But what was the size of the object that you claimed to have seen the defendant drop?

A. I was a cylindrical object approximately five inches in length and an inch in diameter, tied on the end.

Q. Was that the object that was identified in the State court proceedings? Was that the Exhibit 1 to which you are referring? Is that a description of Exhibit 1 also?

A. Yes, it is.

Q. Now, from the time you first identified yourself, as you have indicated, to the cab driver, and I believe you stated to the defendant, until you jerked open the door, as you testified in the preliminary hearing you jerked open the door, was there a time interval? Was this a matter of seconds? What was the time interval from the time you first identified yourself until you jerked open the door?

[fol. 57] A. Just a matter of seconds.

The Court: About as long as it would take you to say what you said you said, to see the man drop the object and open the door, is that right?

The Witness: Yes, your Honor.

By Mr. Grossman:

Q. At the time you identified yourself, I believe you testified you identified yourself by flashing your light on your badge, to show the badge presumably to the occupants of the cab, that is correct, isn't it, Officer? I mean that was the means you used to identify yourself?

A. Yes, sir.

Q. While identifying yourself in this manner, thereafter within a matter of seconds prior to the time you jerked open the door, you claim that you saw an object drop at night on the floor of a taxicab, apparently made some identification of the contents of the object, and all this was done under those circumstances at approximately 11:00 p.m. at night, is that your testimony, Officer Beckmann?

A. May I elaborate on this a bit, sir? I can't answer the question. I would have to explain my answer.

The Court: You may explain your answer.

The Witness: It was 11:00 o'clock at night, the area was well lighted with four overhead lights on each corner of the intersection. I shined my flashlight on my badge. I [fol. 58] saw the defendant take the object out of his pocket and drop it. I shined my flashlight on the object. At that time the defendant then opened the door and I reached for the door also, or rather I grabbed the handle of the door, we both did simultaneously. I attempted to open the door to get to the object, he attempted to get out of the cab——

The Court: Was that the first time that you said that he was under arrest, or was it after he got out of the cab?

The Witness: After he got out of the cab.

The Court: It was after he got out of the cab that you said that he was under arrest for suspicion of narcotics?

The Witness: Yes, sir.

By Mr. Grossman:

Q. Now, you stated, just to clarify that last answer, how long after he got out of the cab did you state he was under arrest?

A. When he alighted from the cab I grasped him by the wrist and told him he was under arrest.

Q. In following this cab and stopping the cab that you related in your preliminary hearing——

The Court: Just a moment. He did not testify that he stopped the cab.

By Mr. Grossman:

Q. Well, in stopping behind the cab and then approaching the cab, as you have related, is it not a fact your inten- [fol. 59] tion was to see if you could locate any, what I think you referred to as, stuff or narcotics in the possession of the defendant? Was that not your purpose at that time? That is, you testified you were investigating narcotics, and the question I am asking you is, was not your purpose in following the cab, stopping behind it and approaching the cab, to see if you would be able to uncover any narcotics in the possession of the defendant? Was that not your object?

A. Yes.

Q. And that was not your object prior to the time you testified that you saw any thing on the floor of the taxicab, or an object dropped on the floor? This was the purpose with which you approached the cab at that time, is that not correct, Officer Beckmann?

A. The purpose was, I thought he possibly had narcotics in his possession.

Q. And you intended, did you not, Officer, to conduct a search to determine whether or not, in fact, this was the case, that is, to confirm your suspicions?

Mrs. Bulgrin: Your Honor, I will object to that question on the ground that his intent, in the sense that counsel uses the word there, is not material.

The Court: Sustained.

By Mr. Grossman:

Q. Now, when you jerked open the door and informed the [fol. 60] defendant he was under arrest, you had not at that time taken this object from the floor or made any further examination of it, had you?

A. When the defendant alighted from the cab and I grabbed him by the wrist, I told him he was under arrest, and with my right hand I tried to retrieve the object on the floor.

Q. But you did not retrieve the object to make any further examination at that time, is that correct?

A. No. He kept pulling away from me and I told my partner——

The Court: You what?

The Witness: I instructed my partner, Policewoman Grace, who had come around the back, to pick up the stuff.

Mr. Grossman: Incidentally, your Honor, I notice Policewoman Grace is present in court noting this. I don't know what the custom is. If the court feels that there be no prejudice in having her continue to be present during this hearing as the events transpired as to which they will probably both be questioned I would not bring it to your attention.

The Court: I do not think there is any prejudice. Certainly if there is any she has had an opportunity to read the transcript and her own testimony.

By Mr. Grossman:

Q. Now, your only basis for inferring that the contents [fol. 61] of this object that you saw was a narcotic was the fact that this was a white powder—you testified it was a white powder or light-colored powder that you saw—I mean that was the basis for your identification of this as narcotics, is that not so?

The Court: Which is your question? Is your question, was that only basis, or was that a basis?

Mr. Grossman: Was that the only basis of your identification of this object as a narcotic?

The Witness: No.

By Mr. Grossman:

Q. Was that in addition to the fact that it was seen in this container that you testified to, was that the only basis in terms of identifying this powder, as to what this powdery subsance was, that is, in terms of the appearance of the object itself, was there any other identifying characteristics that labeled it in your mind as a narcotic other than the fact that it was a powdery substance?

The Court: Counsel, maybe the witness understands your question, but I do not.

By Mr. Grossman:

Q. Was there any identifying characteristic of this container or its contents other than the fact that the container was what you have stated it to be, that the contents you stated appeared to be a white powder, was there any [fol. 62] other identification on the object which indicated to you that this was a narcotic?

A. No.

Q. Now, the container itself was not transparent, that is correct, the container itself was a colorless, whitish, or whatever it may be? This was not a cellophane-like container that would be completely transparent, was it?

A. It is transparent. You can see through it.

Q. It was transparent? Light would come through it but it isn't a clear object in the sense that it was cellophane or a window or something like that?

A. If there were a dark object within the container it would have appeared to be dark.

The Court: If there was ink in it you could see that it was black?

The Witness: Yes, sir.

By Mr. Grossman:

Q. Was there a dark object in this?

A. No.

Q. Was there a light object in this, a light powder, and you were able to see the light powder, that is your testimony, is it not, that you were able to see a light object inside of this container?

A. A light substance inside of this, yes.

Q. At the time you got out of the cab, did Policewoman [fol. 63] Grace get out of this cab at the same time?

The Court: Cab?

Mrs. Bulgrin: I don't believe the record said "cab."

Mr. Grossman: Out of the police car. I am sorry.

Q. At the time she got out of the car did Policewoman Grace also get out of the car at the same time?

A. Yes.

Q. Did she approach the cab?

A. Yes.

Q. Will you indicate where she approached, how she approached, what part of the cab she approached?

A. She approached the cab on the left side.

The Court: You were on the right?

The Witness: I approached the cab on the right.

By Mr. Grossman:

Q. Was she opposite you on the left side of the cab? What part of the left side, the front, opposite the defendant, or where on the left side of the cab was she this time?

A. I don't know her exact position.

Q. Could you see? Were you able to see her position at that time?

A. I could probably see it but I don't recall just where she was at that time. I knew she was there.

Q. But you didn't see where she was at the time?

A. I can't say whether I did.

[fol. 64] The Court: At what time? When he identified himslf with the badge originally, when the defendant got out of the car, or when he grabbed him by the arm?

By Mr. Grossman:

Q. At the time you approached the cab and you state that she approached the cab on the left, when she was standing at the left of the cab when you first approached her prior to any other events, you were not able to see what position she occupied at that time, is that correct?

A. I think I was able to see it. I don't recall just what position she was in.

The Court: You do recall that she was someplace on the left side of the cab?

The Witness: Yes, sir.

The Court: Did you speak to her after the defendant got out of the cab?

The Witness: She came around the back of the cab after he got out.

The Court: She came around on your side?

The Witness: Yes, sir.

The Court: And that was when you told her to grab the stuff?

The Witness: Yes, sir.

By Mr. Grossman:

Q. Did she come around the front or the rear of the cab?
[fol. 65] A. The rear.

Q. Prior to this time she was standing on the opposite side of the cab from you, is that correct?

A. She was on the opposite side.

Q. The opposite side of the cab?

A. Yes.

Q. Do you recall whether any windows were open in the cab at the time of these events, the time you approached the cab prior to your jerking open the door?

A. I believe the right rear window was open.

Q. Do you recal that that was the fact?

A. I can't recall for sure right now.

Q. The front window you recall was closed, is that correct?

A. I am not sure of that either.

Q. You are not sure as to the windows?

A. No.

Q. In identifying yourself, do you recall whether you were speaking, in attempting to identify yourself in speaking to the cab driver or the defendant, whether you were speaking through an open window or a closed window at the time and identifying yourself?

A. No, I can't recall.

Q. It is quite possible that from your present recollection at the time you saw this object that you testified [fol. 66] dropped to the floor that the windows of the cab, on the right side were closed? There is nothing you recall at present that would be inconsistent with that, is there?

A. That is correct.

The Court: When the object dropped to the floor you recognized it as a condom?

The Witness: Yes, sir.

By Mr. Grossman:

Q. And at that time you testified that you were identifying yourself—this was as I recall the transcript—you stated, in effect, while you were identifying yourself in the manner you have indicated, that this object was dropped to the

floor of the cab and you identified it at that time as the object in question, or just a few seconds thereafter.

The Court: This has been asked and answered half a dozen times, counsel.

By Mr. Grossman:

Q. When did you say you yourself first had contact with any Federal officer or agency in connection with this case?

A. When I went over to the Federal Narcotics.

The Court: Do you recall the date?

The Witness: No, I don't recall the date, sir.

The Court. Do you recall if it was after the dismissal in the Superior Court?

The Witness: It was.

[fol. 67] The Court: That appears to have occurred on May 10th, so it was after that date, was it?

The Witness: Yes, sir.

By Mr. Grossman:

Q. In identifying yourself to the cab driver, you were detaining the cab that had originally stopped for other purposes, but you did detain the cab beyond the period for which it had originally stopped, I think you said for a signal, you detained it beyond that point, didn't you, prior to the time you saw the object dropped on the floor, you had detained the cab, is that not correct?

Mrs. Bulgrin: Your Honor, I think the transcript speaks for itself on that point.

Mr. Grossman: I don't recall that the specific question was asked.

Mrs. Bulgrin: I believe it was.

The Court: I do not understand the question. You get so many things in there that if a witness answers it you might be saying yes and no to half a dozen things.

Mr. Grossman: I will rephrase the question.

The Court: The witness has testified that the cab was stopped at a signal and that while it was so stopped at that signal he approached it on the right and identified himself.

What you want to know is whether or not the signal turned before the defendant started to get out of the car, [fol. 68] is that what you want to know?

Mr. Grossman: First whether the signal turned prior to the time you say you saw the defendant drop the object.

The Witness: I don't know.

By Mr. Grossman:

Q. Would you say that the time interval that elapsed was just a matter of a few seconds so that it is possible that the signal might not have turned during that interval? In other words, a period of 10 minutes had elapsed obviously.

The Court: Which question are you asking?

Mr. Grossman: I am asking the first question.

Q. Would you say that a period of just a few seconds had elapsed?

The Court: Do you know whether or not the signal changed while you were at the taxicab?

The Witness: No, sir.

By Mr. Grossman:

Q. Have you made any oral or written statements to any Federal officer or agent in connection with this case, officer Beckmann?

A. I have made an oral statement, yes.

Q. Approximately when was that made?

Mrs. Bulgrin: Your Honor, I will object to that question as being irrelevant to this motion and to the testimony here and is improper cross examination.

[fols. 69-76] The Court: Overruled.

By Mr. Grossman:

Q. When was that statement made?

A. After the trial in the Superior Court, after I had gone to my superior officers and then had gone to the Federal Narcotics.

Q. About how long after the trial? Just approximately as best you recollect.

A. Within a month, I believe.

Q. Was it close to a month?

A. Between two and four weeks.

Q. And in the course of that statement you detailed the circumstances of the offense as it occurred in your presence, is that correct?

A. I showed them a copy of my arrest report at the time I made the arrest.

Q. You mentioned an oral statement. You did make oral statements in addition to this, did you not?

A. We talked about it; yes.

Q. You did discuss the case with them?

A. Yes.

[fol. 77] Redirect examination.

By Mrs. Bulgrin

Q. Mr. Beckmann, I believe you stated that Fifth and Stanford had been an area of Los Angeles which was known by you to have a reputation for heavy narcotics traffic during the time in question, is that correct?

A. Yes.

Mr. Grossman: I object. There is no indication of Fifth and Stanford being involved in this case at all.

The Court: This apparently is a preliminary question. It is not material unless it is connected up. If it is not connected up, it will be stricken.

Mrs. Bulgrin: Yes.

Q. Now, were you assigned previous to February of 1956 ——

A. '57.

Q. '56 or '57?

A. '57.

Q. Had you been assigned to Fifth and Stanford previous to that time in connection with your duties as a police officer?

A. Yes, for four years.

Q. Had you had any experience in that connection with the narcotics traffic?

A. Yes.

[fol. 78] Q. Now, during that time had you ever seen a quantity of heroin contained in a contraceptive?

A. Yes.

Q. Was that in connection with your police duties?

A. Yes.

The Court: It is a common method of carrying it?

The Witness: Yes.

The Court: By those who deal in narcotics which come in a powdered form?

The Witness: Yes, sir.

By Mrs. Bulgrin:

Q. And this is based on your own personal experience, Mr. Beckmann, as a police officer?

A. Yes.

Q. Let me ask you one more thing about that: In connection with the contraceptive in this particular case filed with, I believe what you described, as a white powder, you stated it was five or six inches in length, is that correct?

A. Yes.

Q. Will you tell us what standpoint the receptacle or contraceptive was filled with this white powder?

A. The object, as I testified before, was approximately five inches in length and about an inch in diameter and tied on the end, and it appeared to be a soft, pliable object.

Q. To what extent was it filled with the whitish or [fol. 79] lightish-colored powder?

A. It was completely filed within those measurements that I have given.

Q. Would you say it was filled to the extent of five or six inches of the contraceptive?

A. Yes.

Q. By the way, during your previous police duties at Fifth and Stanford, and also at First and Flower, had you had occasion in your work connected with the narcotics traffic to either arrest adults or have some dealings with them?

A. Yes.

Mrs. Bulgrin: That is all. Thank you.

Mr. Grossman: Just one further question.

Recross-examination.

By Mr. Grossman:

Q. Isn't it a fact, Officer Beckmann, that other than the fact that you testified to regarding the container itself as you stated which you have described, that you were unable to determine, to see, any light-colored material, that you were unable to determine the contents of this object at the time you viewed it because the contents were light contents similar in color to the object, is that not a fact, that you could not determine the nature of the contents at the time you first examined this?

The Court: Will you read that question back to me, Mr. [fol. 80] Reporter?

(The question referred to was read by the reporter as follows:

("Q. Isn't it a fact, Officer Beckmann, that other the fact that you testified to regarding the container itself as you stated which you have described, that you were unable to determine, to see, any light-colored material, that you were unable to determine the contents of this object at the time you viewed it because the contents were light contents similar in color to the object, is that not a fact, that you could not determine the nature of the contents at the time you first examined this?")

Mrs. Bulgrin: Your Honor, I might state——

The Court: Do you have any objection to that question?

Mrs. Bulgrin: Yes, your Honor. It is complex and not understandable.

The Court: Objection sustained.

What are you trying to find out?

Mr Grossman: I am simply attempting to get into the question as to what reason he had in viewing this object to determine what its contents were, your Honor. That is, how he could possibly tell by looking at it just what the contents were. That is essentially my question.

[fol. 81] Mrs. Bulgrin: I think the question is what reason he had to think it was heroin, not whether it was heroin.

Obviously he couldn't make a test of it at that moment, he had to use his common sense in connection with his experience in evaluating what the object was, and if there was any question of probable cause it would be that issue.

The Court: What you are trying to find out is whether or not he then knew it was heroin?

Mr. Grossman: No, whether he then had probable cause to determine whether it was heroin.

The Court: That is for me to decide.

Mr. Grossman: I am attempting to determine the basis of the facts as they appeared to him as of that time, rather than in retrospect to determine whether he had probable cause at that time to give a factual basis.

The Court: I do not know what you are trying to find out now. What question do you want to ask this witness? What are you trying to find out? The last question I could not understand you.

Mr. Grossman: Let me rephrase that. I was simply attempting to determine whether his knowledge as to the contents was obtained from events subsequent to his arrest and seizure of the object, or from events prior thereto, because I think that is one of the crucial issues in this matter.

The Court: When did you first find out that it was [fol. 82] heroin?

The Witness: After my partner, Policewoman Grace, gave me the object.

The Court: Did you then test it, field test it?

The Witness: The only field test I gave it was to look at the substance inside of the container.

The Court: And thereafter when did you find out that it was chemically heroin?

The Witness: When the chemist told me it was.

The Court: Does that answer your question?

Mr. Grossman: Yes, your Honor.

Mrs. Bulgrin: That will be all, your Honor.

The Court: The Witness may step down.

(Witness excused.)

The Court: Do you have another witness here?

Mrs. Bulgrin: Yes, I would like to call Mrs. Grace for just a few questions, your Honor.

BEVERLY P. GRACE, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.
The Witness: Beverly P. Grace.
The Clerk: Your address?
The Witness: 115 North Los Angeles Street, Los Angeles.

[fol. 83] Direct Examination.

By Mrs. Bulgrin

Q. Mrs. Grace, what is your business or occupation?
A. Policewoman assigned to Juvenile Division.
Q. During February of 1957 were you so employed?
A. Yes.
Q. Were you the Beverly Grace who testified in a preliminary hearing in Case No. 136978 on March 12, 1957?
A. I was.
Q. Now, on the 18th of February, Mrs. Grace, 1957, at 19:50 p.m. when you were with Officer Beckmann near the vicinity of First and Flower Streets, are you the one who picked up the contraceptive filled with some kind of a whitish or lightish powder from the floor of the taxicab in question?
A. Yes.
Q. At the time you picked it up, Mrs. Grace, was the defendant inside the cab or was he outside the cab?
Mr. Grossman: I object to this line of questioning. That is exactly what she testified to at the preliminary hearing. She testified that she picked it up, and so forth.
Mrs. Bulgrin: I want to find out exactly where the defendant was that that point, your Honor.
The Court: That question was not asked. Objection overruled.

[fol. 84] By Mrs. Bulgrin:

Q. Would you answer the question, Mrs. Grace?
A. The defendant was outside of the cab.
Q. As you picked up the object off the taxicab floor, what did you see immediately before and at the time you were picking it up?

A. A contraceptive, rather long and filled with a powdery substance.

Q. At whose request did you pick it up, Mrs Grace?

A. My partner, Officer Beckmann.

Q. Is that the gentleman who just preceded you on the witness stand?

A. It was.

Mrs. Bulgrin: That is all, your Honor.

The Court: Where was he when he told you to pick it up?

The Witness: He was outside of the cab.

The Court: On the right or left side?

The Witness: Right side.

The Court: Where was the defendant?

The Witness: On the right side of the cab.

The Court: Were they standing still or struggling?

The Witness: They were struggling.

By Mrs. Bulgrin:

Q. Were you also on the right-hand side of the cab?

A. Yes.

[fol. 85] Q. And you reached in through the door?

A. Yes.

The Court: How long have you been a policewoman?

The Witness: A year and a half.

The Court: How long have you been assigned to Juvenile?

The Witness: One year.

The Court: How long have you been assigned to the Narcotics Detail?

The Witness: I am not assigned to it.

The Court: Were you in February?

The Witness: No.

The Court: That was a special assignment?

The Witness: No.

The Court: How did you happen to be on that job?

The Witness: Well, I am assigned to Juvenile Patrol and any police work that comes into our view we take action.

The Court: You were assigned as a partner to Officer Beckmann then?

The Witness: Yes.

The Court: Have you had any experience in the arrest of people for dealing in narcotics other than this case?

The Witness: Yes.

The Court: How many would you say?

The Witness: Approximately five.

The Court: How long were you assigned to the vicinity [fol. 86] of First and Flower?

The Witness: Approximately six months.

The Court: And during that period of time did you become acquainted with the reputation of the area in the vicinity of First and Flower in connection with the sale and dispensation of narcotics?

The Witness: Yes.

The Court: What was it?

The Witness: Very high.

The Court: Do you know whether or not the contraceptive is used frequently or infrequently as a method of carrying powdered narcotics in your experience?

The Witness: I have heard.

The Court: You have not seen it before? This was your first time?

The Witness: This was the first time I had seen powdered narcotics.

The Court: Very well. You may cross examine.

Cross-examination.

By Mr. Grossman:

Q. Officer Grace, when you got out of the police car as you testified, will you just recount briefly your moments from the time you left the police car at First and State to the time in which you claimed to have picked up the narcotics?

A. I approached the cab on the left side, went approxi- [fol. 87] mately to between the two doors, the rear and the front door of the cab. It was a matter of seconds. I walked around to the right side of the cab, around the back of the cab, my partner pointed to an object and told me to pick it up.

Q. Is that all that you recall as happening during that

period? That is all you observed or participated in during that period?

The Court: Which is your question?

By Mr. Grossman:

Q. Is that all that you participated in up to that time? Was that the extent of your participation in this?

A. Yes.

Q. Did you observe any object being dropped on the floor of the cab between the time you approached the cab and you picked up this object, did you observe any object being dropped on the floor of the cab?

A. No.

The Court: Did you see Officer Beckmann display his badge?

The Witness: I don't recall the actual badge. I recall the flash of light.

The Court: You were then walking upon the left side?

The Witness: Yes, sir.

The Court: And when was it when you turned around on the right side?

[fol. 88] The Witness: I don't recall, just a matter of seconds.

The Court: When the defendant started to get out of the car?

The Witness: It was after the defendant started to get out of the car?

The Court: After?

The Witness: Yes.

The Court: Then you got around there?

The Witness: Then I got around there.

The Court: In a hurry?

The Witness: Yes.

By Mr. Grossman:

Q. In other words, prior to the time the defendant got out of the cab you were standing on the other side of the cab?

A. Yes.

Q. Facing toward the defendant, is that not correct? You were facing the defendant at that time? That is, you

were looking at the defendant in that direction at the time, is that not correct?

A. In the general direction.

Q. You did not see any object dropped on the floor of the cab?

A. No.

Q. The first time you saw any object on the floor of the cab was when Officer Beckmann pointed this object to you [fol. 89] which you retrieved?

A. Yes.

Q. At the time you were observing the defendant from the left side you were standing in approximately the same position to the left of the cab that Officer Beckmann was standing to the right, that is, on opposite sides of the cab?

A. Approximately.

Q. At the time you approached, came around to the right side of the cab along behind the back of the cab, over to Officer Beckmann, you say at that time the defendant was outside the cab and there was a struggle going on, is that correct?

A. Yes.

Q. Was Officer Beckmann examining the object at that time?

The Court: At what time? When he was struggling with the defendant?

By Mr. Grossman:

Q. When you came around to the right side of the cab, did you see Officer Beckmann examine this object on the floor of the cab?

A. No.

Q. Did you at any time see Officer Beckmann prior to your picking up this object examine this?

A. No.

[fol. 90] Q. Did you see Officer Beckmann flash a light to the interior of the taxicab? Did you see him flash a flashlight on the floor of the cab while you were on the left side of the—let me rephrase that.

While you were on the left side of the cab did you see Officer Beckmann flash any light in the cab?

A. I don't recall whether it was on the floor. I saw a flash of light.

Q. But that light might have been the flash of light on his badge in connection with the identification, as far as you can recall now?

A. Yes.

Mrs. Bulgrin: Your Honor, I will object to that. If she wasn't there she doesn't know.

The Court: Overruled.

By Mr. Grossman:

Q. At that point you retrieved the object in question?

The Court: At what point, when she saw a flash of light?

Mr. Grossman: No, your Honor.

Q. After you came around to the right, you retrieved the object in question, is that right, at the direction of Officer Beckmann?

A. Yes.

Q. What did Officer Beckmann say to you at the time, that is, in regard to this? What was his statement, do you [fol. 91] recall?

A. As near as I can recall it was, "Pick it up."

Q. Just "pick it up"?

A. Or "Pick the stuff up," I don't recall.

Q. It may have been just "Pick it up"?

A. Possibly.

Q. Now, so far as you were concerned, when you examined the object in question did it have any identifying characteristics of a narcotic about it at the time you examined it or picked it up?

The Court: Do you know?

The Witness: Well, in my opinion it did, yes.

The Court: You have seen heroin?

The Witness: Yes.

The Court: Quite a number of times?

The Witness: Not quite a number. As I said before, about five times.

By Mr. Grossman:

Q. Was there anything about the object or its contents that led you to the view that this was heroin, that is, in so

far as the object or its contents were concerned, was there anything that led you to the view that this was heroin?

A. Yes.

Q. What was that?

A. The object it was in, the shape of the object, the [fol. 92] form — the object, the feel of the object.

Q. Now, correct me if I am wrong, but it was your testimony, was it not, that prior to this time you had never seen any heroin in a container of this type, in a condom, is that not correct?

A. Correct.

Q. But it is your testimony——

A. May I clarify that? I have seen it in a balloon.

The Court: In a rubber balloon?

The Witness: Yes, but not in a contraceptive.

By Mr. Grossman:

Q. This was not a rubber balloon, I believe that was brought out before.

A. Yes.

Q. It didn't appear to be a rubber balloon? There is no question but that it was not a rubber balloon, is that correct?

A. Yes.

Q. Did you make any statements, orally or written, to any Federal agent in connection with this case?

Mrs. Bulgrin: Your Honor, I will object to that question in view of the court's previous ruling on whether he would be entitled to an agent's resume of oral statements.

The Court: Objection overruled.

Mr. Grossman: I will repeat the question.

[fol. 93] Q. Did you make any statements, oral or wirtten, to any Federal agents or officers or personnel in connection with this case?

The Court: Was that a written statement or an oral statement?

The Witness: It was an oral statement.

The Court: Was it taken down stenographically haec verba?

The Witness: No.

The Court: You just talked to the officer?
The Witness: Yes.

By Mr. Grossman:

Q. Did you ever make an official police report on this case, an arrest report?
A. Yes.

The Court: Separate from that of Officer Beckmann?
The Witness: No, it is the same report.
The Court: It is the same report?
The Witness: Yes.
The Court: It was the two of you jointly?
The Witness: Yes.

By Mr. Grossman:

Q. Just to clarify the matter, you never made or showed any written statement of your — to any Federal officer or agent in connection with this case at any time, is that [fol. 94] correct?
A. That is correct.
Q. Do you know for a fact whether any transcription was made of your statements to the Federal officers or was this merely surmise on your part?
A. I surmised it.

Mr. Grossman: At this point, if the court please, I would request that in so far as the Government has any written record of the statements of this witness as setting forth the substance of her statement as opposed to mere notes taken as to the Government's position in connection with her remarks, that these be produced for inspection along the lines indicated previously by your Honor.
The Court: Do you have any further questions of this witness?
Mr. Grossman: Yes.

Q. When was the first time you discussed this case, or any aspect of it, with any Federal officer or agent, approximately, this oral statement that you are referring to?
A. It was approximately three weeks ago.
Q. That is the statement to which you are referring?
A. Yes.

Q. The oral statement to which you are referring?
A. Yes.

Mr. Grossman: That concludes our cross examination of [fols. 95-100] this witness.

The Court: Do you have any other questions?

Mrs. Bulgrin: No, your Honor.

Mr. Grossman: Except to repeat, I believe I have already made that motion in regard to this witness, as to any statements she may have.

The Court: I will rule on that in a moment.

You may step down.

(Witness excused.)

The Court: Do you have any other witnesses, Mrs. Bulgrin?

Mrs. Bulgrin: No, your Honor.

The Court: Do you have any witnesses?

Mr. Grossman: No, your Honor.

[fol. 101] D. W. Beckmann, recalled as a witness by and on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

[fol. 102] The Court: You have been sworn before.

The Witness: Yes, sir.

The Court: Keep in mind, counsel, that your interrogation here is limited to impeachment.

Mr. Grossman: Yes, your Honor.

Cross-examination. (Continued)

By Mr. Grossman:

Q. Officer Beckmann, refreshing your recollection a bit, did you open the door of the cab prior to the time or subsequent to the time the white object was dropped on the floor of the cab?

The Court: That question has been asked and answered. It is not an impeaching question. He has testified concerning that.

Mr. Grossman: May I show this to the witness before questioning him in regard to it?

The Court: I do not mean to infer that you do not know what impeachment is about, but in the matter of impeachment I may suggest to you that I have to continually remind lawyers of much experience that the matter of impeachment is to determine whether or not this witness made a statement at some other time contrary to the statement he made on the witness stand in this case. Consequently you have that report and you can ask him whether he did or did not say such-and-such, something which is contrary to his present testimony, and that is it. Then [fol. 103] I have to decide whether he is telling the truth then or now. And it has to be a statement which is contrary, otherwise it is not a proper impeaching question.

Mr. Grossman: Thank you, your Honor.

Q. Did you state in your police report in this matter as follows:

"When Officer Beckmann identified himself to arrestee, arrestee reached inside his right jacket pocket extracting a white object. When arrestee did this Officer Beckmann opened the cab door and observed the arrestee drop the object to the floor by his feet."

The Court: Do you want to show him the report? He is entitled to see it.

(The document referred to was passed to the witness.)

The Witness: Yes.

The Court: Is that all?

Mr. Grossman: May I question the witness regarding the veracity of that statement?

The Court: No.

By Mr. Grossman:

Q. Officer Beckmann, did you state in your police report at the time of your police report as follows:

"Arrestee attempted to alight from the cab. At this time Officer Beckmann attempted to retrieve the [fol. 104] object dropped on the floor. Officer could see at this time that the object was a rubber condom containing a large quantity of a powdery substance which

resembled heroin. Officer Beckmann then informed arrestee he was under arrest for suspicion of narcotics."

The Court: Do you want to see the report again?

The Witness: No. I recall that.

The Court: He says he made that statement.

Mr. Grossman: That concludes our cross examination.

The Court: You have no further questions of this witness?

Mr. Grossman: No further questions at this time.

The Court: Do you have any questions?

Mrs. Bulgrin: Yes, your Honor.

The Court: The record will show that the police report heretofore handed to defense counsel is now returned to the Assistant United States Attorney.

Mrs. Bulgrin: Thank you, your Honor.

Redirect examination.

By Mrs. Bulgrin:

Q. Mr. Beckmann, Mr. Grossman just asked you if you had made the statement:

"When Officer Beckmann identified himself to arrestee, arrestee reached inside his right jacket pocket [fol. 105] extracting a white object. When arrestee did this Officer Beckmann opened the cab door and observed the arrestee drop the object to the floor by his feet."

And I believe you answered that you made that statement in your arrest report.

A. Yes.

Q. Will you please explain the making of that statement in connection with the facts?

The Court: What is there to explain?

Mrs. Bulgrin: If I may state, your Honor, I don't know if there is any discrepancy—I don't believe so—between this report and the officer's testimony, but obviously Mr. Grossman has asked it on that basis, and I think the witness is entitled to explain the basis of making this particular statement.

Mr. Grossman: If the court please, I think that is for your Honor to decide.

Mrs. Bulgrin: There is no other reason for Mr. Grossman to ask these questions and it can't stand unexplained.

Mr. Grossman: The court ruled that he would determine if there is any conflict and I don't see what further can be gained at this time.

Mrs. Bulgrin: I think what Mr. Grossman is driving at, your Honor, is, "When arrestee did this Officer Beckmann [fol. 106] opened the cab door and observed arrestee drop the object to the floor by his feet." Now, there was some testimony here as to the sequence of events in seeing the object drop to the floor and the opening of the door, and I don't know whether this means the officer opened the door at that time or just pulled it further open.

I would like the officer to explain the reason for the facts that he placed in this particular statement. I think he is entitled to do that, your Honor.

The Court: What is the ground of your objection?

Mr. Grossman: That this is not proper redirect, and also immaterial.

Mrs. Bulgrin: It isn't redirect, it is cross examination in a sense.

The Court: Whatever the objection is, it is sustained.

If you did not consider the statement to be an impeaching statement or contrary to his statement on the witness stand, you should have then objected.

Mrs. Bulgrin: Well, your Honor, I don't have the transcript before me.

The Court: You have a memory.

Mrs. Bulgrin: I assumed Mr. Grossman is entitled to ask it and then argue that it is impeaching, but I certainly don't think it should go unexplained.

The Court: Let us proceed.

[fol. 107] Mrs. Bulgrin: I would ask the same question with respect to the other statement, your Honor.

Q. Mr. Beckmann, Mr. Grossman asked you if you made the statement:

> "Officer could see at this time that the object was a rubber condom containing a large quantity of a powdery substance which resembled heroin."

I believe you stated you made that statement. Now will you please explain whether this was the first time that you saw that the object was a rubber condom containing a large quantity of powdered substance which resembled heroin, or whether you had also seen that such was the case previous to that?

The Court: Previous to what time?

Mrs. Bulgrin: Previous to the time just following the previous sequence where it says the officer attempted to retrieve the object dropped to the floor.

Mr. Grossman: Objection, your Honor, on the same grounds as previously stated. Also on the ground that this is a leading question and somewhat confusing.

The Court: The objection is sustained.

Mrs. Bulgrin: That is all I have.

The Court: Step down.

(Witness excused.)

[fol. 108] The Court: Any further testimony?

Mr. Grossman: No further testimony.

Plaintiff and Defendant Rest

The Court: The defendant rests?

Mr. Grossman: Yes, your Honor.

The Court: The Government rests?

Mrs. Bulgrin: Yes.

The Court: Are you ready for a ruling?

Mr. Grossman: We would like to have a few moments for argument, your Honor. The defendant would like to present a very brief argument, if it is possible to do so at this time.

The Court: On the facts?

Mr. Grossman: On this phase, yes, the second phase which has not been argued heretofore.

The Court: Very well.

Mrs. Bulgrin: I might wish a few words of rebuttal, but they would be very few, your Honor.

The Court: Proceed.

Argument by Mr. Grossman

Mr. Grossman: May it please the court, at the outset I wish to renew the reservation made yesterday by defend-

ant at the time the second phase of this matter was taken up, to the effect that the defendant, in going into the factual side of this after the adverse ruling of the court as to the preclusion of that by the prior State ruling, is not waiving any objections he has to the prior ruling of the court on the other phases of this matter.

[fol. 109] Secondly, by way of preliminary statement, your Honor, I urge and ask the court, in considering the defendant's motion to inspect the grand jury transcript, that that motion be viewed in light of the Jencks decision and the fact that the statements therein transcribed were statements by witnesses who have been on the stand here who testified at the trial of this case who are going to be key witnesses in this case, and it is our position that the Jencks rule lends further support to the motion to inspect the grand jury transcript as it reflects statement of complaining witnesses.

In view of the limited scope of this motion, I have not made a request to examine that transcript at this time, but I wish to urge this on the general motion as a whole.

The Court: I do not understand you.

Mr. Grossman: Our position, your Honor, in connection with our motion to inspect the grand jury transcript is that in so far as the Jencks case will be pertinent, or would be pertinent to any subsequent proceedings, that our failure to request the grand jury transcript at the present time shall not be deemed a waiver of our right to request that statement under the Jencks rule, despite the fact that it was not produced at this hearing as a statement by the witnesses here.

The Court: Are you now withdrawing your request to inspect the grand jury transcript?

Mr. Grossman: No, your Honor. I am merely stating [fol. 110] that the mere fact that we have not asked the court to delay these proceedings while we examine the grand jury transcript under the Jencks rule in connection with this motion, as a transcript of statement of these witnesses, is not to be deemed a waiver of any right we might have in the event the action were to come to trial, to make a request under the Jencks rule for the statements heretofore produced today, and in addition to that the grand

jury transcript as a statement coming within the Jencks rule.

The Court: Your position is that you are not now pressing your motion for the grand jury transcript but you wish that deferred?

Mr. Grossman: We are not now pressing it on that ground, on the ground of the Jencks decision, your Honor, not on that basis.

The Court: Do you want the grand jury transcript today or not?

Mr. Grossman: No, we are not demanding it at this time.

The Court: Very well.

Mr. Grossman: But I believe, I say the reason for my reservation is to this extent, if your Honor deems it pertinent to the motion to quash, or feels there is any issue on that motion to quash, which could be resolved by this, but I am not pressing it at the present time because it is my understanding from what has transpired here that it is quite [fol. 111] apparent that the indictment was, in fact, based on essentially this evidence. So should the court determine that the evidence was illegally obtained we then believe that the motion to inspect the grand jury transcript at that point may again become pertinent as a means of determining whether this was the evidence before the grand jury. But since this question of illegality is the one now before the court we are not pressing it at this time.

I hope I make myself clear to the court.

The Court: No, you do not. I asked you the pointblank question and you said no, you did not want the grand jury transcript now.

Mr. Grossman: No, your Honor. I stated that in urging our right to examine the grand jury transcript at this time we are not urging it and we have not urged it in our memorandum at this time on the basis of the Jencks case.

The Court: You move to put your motion to inspect the grand jury transcript off calendar?

Mr. Grossman: No, I want to retain it on the calendar.

The Court: Do you want a ruling today?

Mr. Grossman: Yes, we would like to have rulings on all of those matters, reserving our right to renew the motion to isnpect in the event a trial of this case were had, under the Jencks ruling. I believe at that point, if the witness

were put on the stand at the trial, at that point we would [fol. 112] wish to renew our motion to inspect the grand jury transcript.

I just wish to make it clear as to what our position will be in the future on that, that is all.

The Court: Very well.

Mr. Grossman: Now, the facts in the present case as adduced before this court, which includes the testimony at the preliminary hearing, I believe bear out very well the reference by Judge Odemar at page 3 of the transcript, where he states, ". . . what in the world is the use of our having a Constitution and having rights if they are meaningless?"

Now, I recognize at the outset that this is a narcotics case. Narcotics cases are very serious cases. We wouldn't attempt to minimize the importance of them to this court.

But I wish to call the court's attention to the concluding statement which we have from Judge Youngdahl, to the effect that while it is quite true that the narcotics traffic must be stamped out, it is equally clear that that traffic must be stamped out in a constitutional manner. That is the effect of Judge Youngdahl's statement, but it must be wiped out in a manner consistent with the protection of our Constitution, and that is precisely the position we are urging here.

The Court: What is unconstitutional about this?

Mr. Grossman: It is our position, in answer to the court's question, just to make it clear——

The Court: Before you answer that question, I under- [fol. 113] stand Judge Odemar's ruling to be that the search and seizure was unlawful because there was no reasonable ground on the part of the arresting officer to suspect that the defendant was then engaged in the commission of a crime.

Mr. Grossman: That is correct. And that there was no valid arrest accompanying this as a means of supporting it, your Honor.

It is our position, as I argued previously—I will not repeat that here—that, first of all on constitutional grounds, as well as other grounds, we have already urged to the court that that determination by Judge Odemar is con-

clusive on this court for the purposes of the present motion, and that this court, in fact, has no authority to proceed de novo because that in itself is sufficient ground to compel, and compels, the granting of this motion.

However, the court having seen fit to deny the motion on that ground, we again raise a second constitutional point, at a factual level to this extent, and that is aside from the conclusive effect of Judge Odemar's decision, and from the effect of an adjudication under Cahan, of the fact that the defendant has already been subjected to prior proceedings and is now being subjected to additional proceedings on the same search and seizure point previously determined, that additionally under the facts of this case, when the ruling of law of this court was made in [fol. 114] failing to follow Judge Odemar's decision—that is, to regard it as conclusive—that additionally when the facts of this case are considered and the nature of the search and seizure considered, that this additional ground is an alternative, and if the first ground were correct there is no need to consider the second.

But on this alternative ground, the facts here when considered in light of the legal principles which we have heretofore argued, namely, the problem of condoning unlawful acts, and so forth, are such as to require the sustaining of Judge Odemar's position, not only because of their conclusive effect but also because of the underlying facts of the search and seizure, and that for the Federal court to sanction this conduct in light of the prior decision, coupled with the underlying facts of the case, is an additional consideration that it is equally clear on this additional ground that the motion should be granted.

In that regard I wish to refer briefly to the summary of the facts which show substantially as follows:

A juvenile officer, not a narcotics officer but a juvenile officer, seizes someone whom he doesn't know at all, has no direct knowledge of him (and that was his testimony at the preliminary hearing) sees someone get into a cab, a yellow cab, at the vicinity of First and Flower, which is certainly a common act, I might say. I have done that myself and I hope I will not find myself getting picked up for doing so.

[fol. 115] The Court: Coming out of a rooming-house at First and Flower and getting into a taxicab?

Mr. Grossman: I don't believe there is any testimony at all regarding the details, as relating to the place from which he had come out of, or the origin of the defendant in treating this as a suspicious circumstance, your Honor. I don't believe there is any testimony as to that nature of it. I don't believe there is any statement that anyone saw him coming out of a building which in itself was the basis for suspicion.

The Court: Let us say that he did not come out of any building, then.

Mr. Grossman: That this was not a basis for the arrest, your Honor.

That seeing the defendant get into a cab in this area and looking around before he got into a cab;

That Officer Beckmann, accompanied by Officer Grace, then followed the defendant for some two miles and pulled up behind him when the cab stops for a traffic light;

They come up to him, and while there is a conflict of testimony at this point, I think it is clear, first of all, that the officer was investigating narcotics—this was all one transaction, one essential investigation—and that in so doing his own testimony is that he saw an object, first that he saw the defendant reach in and take an object out of his pocket, or out of his jacket, and in the arrest report, at least, [fol. 116] his testimony was that he thereupon jerked open the door of the taxicab and that then the defendant dropped the object.

He testifies this all took place in a matter of seconds. He testifies this took place while he had the flashlight shining on his badge.

Then, as I recall, there is some testimony to the effect that he flashed the light on the floor of the cab, but I believe he also testified this happened in seconds when he was identifying himself late at night.

He testified that there was some light at the intersection, but that all this happened in a matter of a split second, because the next thing he states is that there was a struggle, a chase, and so forth, and in this matter of split seconds he suddenly determined that this must be a case involving possession of narcotics, the object here must have contained

a powder, or at one point he stated he didn't discover this until after he subsequently examined it after the defendant apparently had been placed under arrest, after he had told the defendant he was under arrest and this pursuit followed.

Now, from the basis of this, and I might point out the other officer certainly testified that she did not see any object being dropped to the floor, although she was on the opposite side of the cab from Officer Beckmann, presumably they had a similar view, and on the basis of this rather flimsy [fol. 117] episode the defendant is arrested and taken into custody, and so forth, following a course of conduct in which we submit, your Honor, that essentially the search so begun once the officer approached the cab and identified himself, first identifying themselves to let the cab driver know that they were police officers and they identified themselves, we submit, as a part of this overall specific pattern.

This was even prior to anything being dropped on the floor. We submit it was even subsequent to the statement as to anything being dropped on the floor, which itself is a bit hazy to say within a matter of seconds a condom is dropped on the floor, or an object is dropped on the floor, that the officer having probable cause to believe it a narcotic —in effect this all seems rather flimsy.

Also at the time, not knowing anything about the defendant, the officers came up to the cab and essentially instituted a search and seizure.

Now, it is our position, your Honor, that under such circumstances the search and seizure is unlawful, and that in any event these facts compound the effectiveness of our previous point, which was urged independently of the Cahan ruling, having been made by the State court it is not for this court to reopen it, but the court having nevertheless rejected that ground as an additional ground we submit that on the evidence before the court that if the search and [fol. 118] seizure is to have any validity at all in narcotics cases—and we don't believe there is any different application in the rule in narcotics cases—we submit that the motion to suppress should be granted.

We also submit and urge again to your Honor that the indictment should be quashed, and we believe that if your Honor is of the view for which we are urging as to the evidence coming in on an illegal search and seizure, that an

inspection of the grand jury transcript will reveal beyond question that it was the testimony of Officers Beekmann and Grace that led to the indictment, and we therefore seek to dismiss or quash the indictment.

These, then, are the grounds of our motion, namely, first, that the State court having made the determination, the defendant having gone through this, the police having failed to sustain the legality of the search, that this search should not be used as a vehicle for circumventing Cahan and that that would violate the constitutional rights of the defendant.

Secondly, that when all the foregoing are coupled with the facts of this case, and the fact that the officers here were essentially coming out searching a cab because the defendant got into it in a particular neighborhood, if that is going to be sufficient basis for a search and seizure then the right against search and seizure means very little.

This is an additional ground coupled with the other be- [fol. 119] cause all of these have to be taken into account in our second point to couple the facts with the legal position because our second point is that it is a violation of due process, and that that violation of due process is heightened under the facts of this particular case, although we also believe that the factual determination is something that could not be gone into.

But at this factual level and on this basis I might say that the Daniels caes would not be controlling because in so far as the court is going to consider the facts and consider the effect of the State court ruling, or whether it is going to be considered binding, this case has to be considered on its own facts. And it may be that in the Daniel case, even though the court no doubt ruled against the defendant, on our first ground which we still present to the court, which was rejected here, but this second ground, that the facts and the legal principles, coupled with the nature of the search and seizure is an additional basis here, and on that ground we submit the Daniel case, which the court considered, I believe, on a reconsideration, should not be regarded as controlling here in any event.

These, then, are the two grounds of our motion, one of which was rejected by the court, and the second ground which we are urging here and in the additional light of the facts I urge the court to grant our motion.

[fol. 120] I will not burden the court by a detailed resume of the evidence, but I do wish to call the court's attention to the fact, as Judge Odemar stated, if the right against search and seizure without warrant is to have any meaning whatever, certainly in this type of situation it should be sustained.

I wish to point out again that if the Government comes back, as they no doubt will, and says, well, this isn't a "silver platter" case, in addition to the relevancy of the argument we advanced in connection with out initial argument, I wish to call the court's attention again to the fact that none of the cases cited by the Government have held that the "silver platter" doctrine is going to be applied in a situation when you have the compounding elements here, namely; a prior State court determination, plus an unlawful search and seizure. We submit such a situation participation should not be required.

Finally, your Honor, in concluding this, I wish to state that in so far as we have cited this Gambino case in our memorandum, dealing with a case where they held that the State officers, since they were seizing evidence that could not be used in any State proceedings, were acting as Federal agents, that is the case relied on by Judge Mathes, and here too we submit, your Honor, as an additional point that since this evidence would have been admissible beyond any question under the State court's ruling in any State court proceeding, the only real basis [fol. 121] for the seizure, the only basis for this seizure, would be its use which is being sought here in a Federal court proceeding, and as to that extent, aside from any question of conclusion, and so forth, which at least, in so far as it is open here, may not directly appear on the record, we submit that these officers could not have been acting as State officers because under Cahan they would have been seizing evidence that could not have been used in a State court.

The only other alternative is that they were acting as Federal officers, and we submit on that basis, your Honor, as held in the Gambino case, as held in the Proctor and Hall case, that this court should not sanction such a course of procedure.

Thank you very much for the extensive time which you have given us on these motions.

The Court: That is what I am here for. I am not to be thanked.

Do you wish to argue, Mrs. Bulgrin?

ARGUMENT BY MRS. BULGRIN

Mrs. Bulgrin: Well, I know it is getting late, your Honor, but I noticed in this transcript so far as the defendant across the street was concerned that the ruling was unfavorable. I would like to point out one thing, your Honor. I think that the whole point of the fact of this picking up of the narcotic has been missed in Mr. Gross- [fol. 122] man's argument and, with all due respect, by the court as well as the people across the street.

In this case, your Honor, I think it is significant that the heroin was abandoned by the defendant before he jumped out of the taxicab and before he was placed under arrest and before the officer took any steps which could be said to put him under arrest. I believe it was the right of the police officer to pick up anything he had dropped on the taxicab floor, and therefore I don't believe that there was a search and seizure which would be within the purview of the Fourth Amendment. I have placed that point in my memorandum.

But in this case of course the State court's decision is not binding on this court. The Government was not a party to that action, and I think that even the arrest, the subsequent arrest where the officer said, "You are under arrest," as the man tried to break away, could be said to be lawful, your Honor.

There the officer had seen a familiar object to him, an object which he had seen before in the course of his duties, which was the contraceptive filled with a whitish powder, which is the normal package used to carry heroin, and at any event we urge that there was an abandonment of the object here and therefore the defendant's rights weren't violated. He threw it overboard and left the premises, so to speak. Therefore he can't make any complaint.

[fol. 123] If it had been taken off his person by the officer before he placed him under arrest, before he had any reason to believe it was on his person, that would be

an entirely different thing. But the officer saw it on the floor of the taxicab.

I won't waste the court's time with respect to the Gambino or Proctor and Hall decisions. The Government urges that there was no Federal participation here, assuming it was an unlawful search and seizure. As I stated before, the Proctor and Hall case was prior to your Daniel's decision on the motion to suppress, and I did not have an opportunity to give the law which is in my memorandum to Judge Mathes. The motion was made in the middle of the case. It put us at a disadvantage.

The Court: Very well.

Mrs. Bulgrin: We will rest without any further argument.

MOTION TO INSPECT GRAND JURY TRANSCRIPT DENIED

The Court: The motion to inspect the grand jury transcript is denied.

MOTION TO QUASH INDICTMENT DENIED

The motion to quash the indictment is denied.

There remains now to determine the motion to suppress.

The first ground upon which counsel for the defendant stands is that there has been a final decision by the State court of California holding that the search and seizure was contrary to the laws of the State of California and that that is binding on this court.

[fol. 124] There have been no cases decided in the Federal system where there has been a previous decision by a State court.

Mrs. Bulgrin: Judge East decided one up North, your Honor.

The Court: I mean there have been no reported cases in the higher courts. I decided one too, for that matter.

But I think in this case that I am bound with respect to the decision by the State courts by the doctrines of the Parker case in 183 F(2d), the Anderson case in 237 F(2d), both Ninth Circuit cases, and the Lustig case in 338 U. S., all of which bear on the question and all of which have as the underlying philosophy that unless there is Federal participation shown then the search by the State officers, even

though it be unlawful, does not permeate the Federal proceedings. For that reason I adhere to my ruling in that respect.

And for the further reason that I am of the view that where the question is raised that the United States has the right, if it desires, to have its own courts determine as a question of fact whether or not the search and seizure was or was not lawful. In this case evidence has been produced and I deem it my duty to make my independent decision regardless of the decision of Judge Odemar.

I have read the transcript before Judge Odemar, which was taken before Judge Kaufman on the preliminary hearing, and the transcript of Judge Odemar, and he apparently [fol. 125] bases his whole decision of unlawful search and seizure on the ground that he did not think it reasonable that a person would think a felony had been committed under the circumstances described in Officer Beckmann's and Officer Grace's testimony in the preliminary hearing.

There has been additional testimony before this court which was not in the transcript, and approaching the problem in the same manner that it was approached by Judge Odemar, that is to say, to determine whether or not there was reasonable ground for an arrest, I must reach the conclusion that there was reasonable ground for the arrest, that there was nothing unreasonable about it.

We have here this situation: (1) The general location at which the defendant was first seen by the officers that night, which has a general reputation as being a hangout for narcotics peddlers and (2) the suspicious actions of the defendant.

Judge Odemar did not pay much attention to them, but when placed in that vicinity, with the taxicab waiting in a parking lot for a man to come out of a building, look up and down one street and then go to First Street and look up and down First Street, and then go to the parking lot, would arouse the suspicion of any conscientious officer.

No arrest as yet has taken place, no deterrents had been placed at that time upon the defendant, but the officers [fol. 126] followed the defendant in a taxicab to the intersection that was testified to, a brightly lighted intersection, and there the taxicab was stopped by a traffic light. The officers did not stop the cab, they did not do anything to

the defendant. The officer approached the cab from his right, Officer Beckmann, and Officer Grace from the left. The officer identified himself as a police officer. That is all uncontradicted.

The defendant here could have called the taxicab driver if he wanted to contradict the testimony and he need not have even put the defendant on the stand, but it is absolutely uncontradicted that the officer did identify himself as a police officer with a flashlight and showed his badge. That almost simultaneously the defendant dropped this object out of his pocket, took it out of his pocket and dropped it on the floor.

Now, the officer testified that in his experience it was common knowledge that a container used for the carrying of powdered narcotics, to-wit, heroin, was a condom or a contraceptive. He observed that it was such an object and that it was filled with some kind of a lightish powder.

It was then that he opened the door, or started to, and at the same time the defendant attempted to get out of the cab. It was then that he opened he door, and not until after he had observed that under all of these circumstances, and under the circumstances of the defendant attempting to get out of the cab, that the officer then placed him under arrest. [fol. 127] It seems to me that it is highly reasonable that any conscientious police officer would be justified in reaching the conclusion that the defendant was then engaged in the commission of a felony, to-wit, the transportation of narcotics, or the dealing in narcotics in some manner or other, and he was justified in then placing the defendant under arrest.

Actually I agree with Mrs. Bulgrin, the Assistant United States Attorney here, that there was no search. This was a public vehicle. The defendant before Officer Beckman arrested him severed himself, or attempted to, from this package and abandoned in on the floor of the public vehicle where it was retrieved by Officer Grace and where the actions of the defendant were observed by Officer Beckmann.

So on those two grounds, the circumstances under which all of the actions of the defendant and the officers occur, the location, the movement, the dropping of the object, the

object was a contraceptive commonly used by peddlers and people dealing in narcotics, the attempt to get out of the car—all before the officer placed him under arrest—indicates to me that the arrest was reasonable and the search and seizure was lawful.

And if that is not sufficient, I would base by decision on another ground, that there was no search, that there was an abandonment here by the defendant. He was not placed under arrest, he had not been advised that he was under [fol. 128-135] arrest, he had simply identified himself to him as a police officer.

Motion to suppress evidence is denied.

These circumstances surrounding this transaction must enter into every situation, whether it is a police officer performing him duty or whether it is any of us doing the thing that we ordinarily do, and to hold that these circumstances here made it unreasonable for Officer Beckmann and Officer Grace to arrest this defendant would seem to me to require me to hold that it would be unlawful if an officer observed a bald-headed man to go in a wig store and then come out with hair showing under his hat, to assume that he hadn't gotten a wig in the store. In other words, all the circumstances lead me to but one conclusion, and the motion to suppress the evidence is denied.

[fols. 136-153] COLLOQUY

Los Angeles, California; Tuesday, July 23, 1957; 10:00 A.M.

(Other court matters.)

The Clerk: Case No. 26019, United States v. Jose Terrones Rios for trial.

Mrs. Bulgrin: Ready, your Honor.

Mr. Grossman: Ready, your Honor.

The Court: The record will show the defendant is present in person and by counsel.

The clerk will fill the box.

[fol. 154] The Court: Very well. Call your first witness.

Mrs. Bulgrin: Officer Carter.

JACK OLIN CARTER, called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Jack Olin Carter.

The Clerk: Your address, please?

The Witness: 150 North Los Angeles Street.

Mrs. Bulgrin: Your Honor, I have a little problem with my evidence. The witness who has brought it over——

The Court: Is it sealed?

Mrs. Bulgrin: This is in an envelope and then there is an inner envelope, your Honor. The witness does not want [fol. 155] to leave it in evidence. I would like to straighten that out. I have to have it marked for identification and will offer it, your Honor.

The Court: Go ahead with your case. We will cross that bridge when we get to it.

Mrs. Bulgrin: In that event I will have this envelope, which has a No. 189270, and apparently a wax seal on the face of it, marked for identification as Government's Exhibit No. 1.

(The envelope referred to was marked Government's Exhibit No. 1 for identification.)

Mrs. Bulgrin: I would like to hand this to the witness.

(The exhibit referred to was passed to the witness.)

Direct examination.

By Mrs. Bulgrin:

Q. Mr. Carter, I will hand you Government's Exhibit 1 for identification ——

First let me ask you, what is your occupation?

A. Police officer for the City of Los Angeles assigned to the Scientific Investigation Division as a chemist.

Q. Will you please give us a brief resume of your educational qualifications as a chemist, Mr. Carter?

A. I studied three years at the City College of San Francisco in the major of general chemistry and graduated with a degree of Associate in Arts.

I studied three years further at the University of Cali- [fol. 156] fornia in the major of forensic chemistry or

technical criminology and graduated with a degree of Bachelor of Science.

I was employed approximately one year as an industrial research and control chemist prior to joining the police department. I have been a police officer nearly four years and in my present assignment slightly over one year.

Mr. Grossman: If the court please, I failed to stipulate that this witness is an expert chemist, as far as that is pertinent here.

Mrs. Bulgrin: We would accept that stipulation, your Honor.

The Court: Very well. The stipulation is approved.

By Mrs. Bulgrin:

Q. Mr. Carter, have you qualified as an expert before?

A. Yes, ma'am.

Q. Will you please look in Government's Exhibit 1 for identification ——

The Court: Have you ever seen that envelope before?

The Witness: I have.

By Mrs. Bulgrin:

Q. What do you find inside, Mr. Carter?

A. There is a smaller manila envelope within the larger envelope.

The Court: What is the large envelope?

Mrs. Bulgrin: No. 1 for identification.

[fol. 157] The Witness: Government's Exhibit 1 for identification.

The Court: Yes, but what is it?

The Witness: It is a property envelope such as is generally used for the keeping of evidence.

The Court: Is it now unsealed?

The Witness: It is.

The Court: And who unsealed it?

The Witness: I did, your Honor.

The Court: And it was in the possession and sealed until you unsealed it?

The Witness: No, sir. It was sealed when I obtained it at the Central Property Division.

The Court: That is what I say, it was sealed until you unsealed it?

The Witness: That is correct.

The Court: And when you unsealed it, after you unsealed it, did it have the same contents that it has now?

The Witness: It does.

The Court: What are its contents?

The Witness: Within the larger envelope is a smaller manila envelope and within that is a rubber sheath containing 60 grams, or 2.13 ounces of a whitish powder.

By Mrs. Bulgrin:

Q. Did you subject that powder to a chemical analysis?

A. It was subjected to a series of chemical analyses.

[fol. 158] Q. Did that include a microscopic analysis?

A. It did.

Q. Did you come to a conclusion as a result of these analyses as to the substance of the material contained in the rubber sheath?

A. I did.

Q. Will you please tell us what your opinion is?

A. In my opinion the powder contained within this rubber sheath contains the narcotic diacetylmorphine, more commonly referred to as heroin.

Mrs. Bulgrin: Your Honor, I would like to have this rubber container and the whitish powder marked as 1-A.

The Court: How many grains is that?

The Witness: I would have to figure it out, your Honor.

The Court: I have forgotten how many grains in an ounce, 437, I think.

The Witness: In an ounce, yes. It would be slightly over 800 grains.

The Court: Then that would be 1019 grains?

The Witness: Yes, sir.

Mrs. Bulgrin: I would like to have this marked as Exhibit 1-B. This is the smaller envelope from which Mr. Carter withdrew Exhibit 1-A.

(The articles referred to were marked Government's Exhibits Nos. 1-A and 1-B for identification.)

[fol. 159] By Mrs. Bulgrin:

Q. After you examined it, did you place it back in that envelope?

A. Yes. Upon the conclusion of my analyses these items were returned to their original containers and the envelope placed in my personal narcotics locker until I made a court appearance on the matter later on in the month of February. I do not recall the precise date. At that time I left it with the clerk of that court.

Q. By the "original container," what do you mean, for the record?

A. The envelope in which it was originally received.

Q. How about this little envelope, Exhibit 1-B, from which you withdrew Exhibit 1-A?

A. That was also returned to this envelope.

Q. When you returned it, was the top of the sheath tied?

A. It was tied in a knot. I tied it myself.

Mrs. Bulgrin: That is all.

The Court: You left it with the clerk of the Superior Court?

The Witness: Of the Municipal Court, your Honor.

The Court: When was it returned to you?

The Witness: Just this moment.

The Court: By whom?

[fol. 160] The Witness: By counsel for the United States, your Honor.

The Court: Very well.

Mr. Grossman: No cross examination of this witness, your Honor.

The Court: You may step down.

(Witness excused.)

Mrs. Bulgrin: I would like to call Mr. Wilcox.

The Court: What about the rubber contraceptive? You have not identified that yet or given it a number. You have given the paper envelopes numbers.

Mrs. Bulgrin: That was 1-B.

The Court: 1-B I thought was the small envelope.

The Clerk: That was 1-A.

Mrs. Bulgrin: Exhibit 1-B is the small envelope and 1-A is the contraceptive.

The Court: Very well. Next witness.
Mrs. Bulgrin: Mr. Wilcox, please.
May Mr. Carter be excused?
The Court: Yes. You will be available on call if needed, however.

RICHARD G. WILCOX, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.
[fol. 161] The Witness: Richard G. Wilcox.
The Clerk: Your address?
The Witness: 5760 Scrivner, S-c-r-i-v-n-e-r, Long Beach.

Direct examination.

By Mrs. Bulgrin:

Q. What is your occupation, Mr. Wilcox?
A. I am a Deputy County Clerk.
Q. Will you please take a look at Government's Exhibit 1, 1-A and 1-B in front of you, sir. Did you bring those into court this morning in the same condition you find them in now?
A. I did.
Q. How long have you had custody of those articles, Mr. Wilcox?
A. Since March 12, 1957.
Q. Is that the same date that Mr. Carter left them with the clerk of the court?
A. Yes, ma'am.
Q. Are they kept in a safe or other such receptacle?
A. We have a large vault with a big steel door.
Q. Were these objects kept in that large vault during this time until you brought them into court this afternoon?
A. Yes, ma'am.

The Court: Were they in the same condition when you received them?
[fol. 162] The Witness: Yes.
The Court: As they are now?
The Witness: They were in the large envelope.

The Court: I mean all three of them were in the same container that they are in now?
The Witness: Yes, sir.
The Court: Very well.

Mrs. Bulgrin: That is all.
The Court: Cross examine.
Mr. Grossman: No cross examination.
Mrs. Bulgrin: May this witness be excused?
The Court: You may be excused.

(Witness excused.)

Mrs. Bulgrin: I would like to call Mr. Smith to the stand.

GRANVILLE MCCREADEY SMITH, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.
The Witness: Granville McCreadey Smith.
The Clerk: Will you spell your name?
The Witness: G-r-a-n-v-i-l-l-e, M-c-C-r-e-a-d-e-y, S-m-i-t-h.
The Clerk: Your address, please?
The Witness: 1440 Angelus Avenue, Los Angeles 26.

[fol. 163] Direct examination.

By Mrs. Bulgrin:

Q. What is your occupation, please, Mr. Smith?
A. I drive a taxicab for the Yellow Cab Company here in Los Angeles.
Q. Mr. Smith, were you on duty in the evening of February 18, 1957, as such?
A. Yes.
Q. Did you see the defendant Rios on that evening in Los Angeles?
A. Yes.
Q. Were you driving your taxicab at that time?
A. Yes.
Q. Where did you see him and what happened? Where did you first see him and what happened at that place, Mr. Smith?

A. He hailed my taxicab at Third and Broadway. I was cruising south on Broadway looking for a fare, and he hailed me.

Q. Was he alone at that time?

A. No, there was another man with him.

Q. Where did you take them?

A. To First and Flower.

Q. What happened at First and Flower, Mr. Smith?

A. There is an apartment house there at the northwest corner, and he had me put my taxicab up into a parking lot [fols. 164-165] adjacent to this large building, and he asked me to wait there for them.

Q. Did you do so?

A. Yes.

Q. Where did they go, Mr. Smith?

A. Well, so far as I noticed they walked over toward the apartment, I believe the defendant walked toward the front entrance, that would be the east entrance, and his companion walked over toward a sort of an entrance toward the side, I think on the south side of the building.

Q. After they each walked toward the building, did you wait there in the lot?

A. Yes.

Q. Did you receive any money before they left from the defendant?

A. Yes, the defendant gave me a $2 deposit and asked me to wait for them; said they would be a few minutes.

Q. How long did you wait, Mr. Smith?

A. In the neighborhood of 10 minutes.

Q. Did either of the two men come out of the apartment-house after that?

A. Yes, the defendant did.

Q. What did he do?

A. Let me say this, my taxicab was facing south, I had my back to the apartment house, and I heard the defend- [fol. 166] ant's footsteps walking toward the cab. I looked around and he was walking toward the cab from the side entrance of the building. I didn't actually see him come out.

Q. Did you see what he did after he came out of the building—I am assuming something you didn't see—but did you see what he did as he approached your taxicab?

A. He approached the taxicab. That is all I saw.

Q. Did he get in?

A. Yes.

Q. What happened after that, Mr. Smith?

A. He asked me to take him to Whittier and Concord.

Q. How far away is that, if you know, from the point where you were sitting in the taxicab?

A. Whittier and Concord from First and Flower?

Q. Yes.

A. I could give it to you more easily in terms of taxi fare and estimate and translate it into taxi fare.

Q. That is all right, if you can do that.

A. Just as a very rough guess, I would say the fare would run from there over to Whittier and Concord about $2, which would represent about a five-mile trip, give or take a mile or two.

Q. Did you commence the trip, start traveling toward that destination?

A. Yes. He asked me to proceed east on First Street [fol. 167] for a ways.

Q. What happened during the trip? Did you stop at any point?

A. Well, there are quite a number of traffic signals between First and Flower and——

Q. Let me put it this way: Did you see Officer Beckmann during the course of that trip on that evening?

Will you stand up, Mr. Beckmann? (Officer Beckmann stood as requested.)

A. I saw Officer Beckmann that evening; yes.

Q. Will you tell us what happened at the time you saw him, please, Mr. Smith?

The Court: Just before you saw him, what happened?

The Witness: Just before I saw him, Office Beckmann?

The Court: Yes.

The Witness: Well, I first saw Officer Beckmann at the intersection of First and State Streets when I was waiting for a traffic signal.

Now, prior to that time what I was doing, I was driving eastwardly on First Street.

The Court: How did you happen to stop at First and State Streets?

The Witness: I stopped for a red light.

The Court: Was there a car ahead of you?

The Witness: No, I was in the center lane straddling the [fol. 168] streetcar tracks.

By Mrs. Bulgrin:

Q. Was there other traffic there, do you recall or not?

A. Well, I didn't notice. There wasn't any going the same direction that we were in that block. Whether there were cars facing the other way waiting for the signal, I don't recall. I didn't notice.

Q. When did you first see Officer Beckmann that evening?

A. When I was waiting for the traffic signal at First and State.

Q. Was the light red at that time?

A. Yes.

Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left.

The windows on the cab, that is, the front window at any rate, was rolled up, and if he was saying anything to me I couldn't hear, but he gestured with his flashlight, I believe, toward his billfold and I got the idea that he was policeman.

Q. He wasn't in uniform at the time?

[fol. 169] A. No. And I didn't see a badge. I merely saw his billfold that he was holding in his hand.

The Court: Then what happened?

The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

By Mrs. Bulgrin:

Q. What did the defendant do? What was happening as far as the defendant was concerned?

A. Well, he appeared to be becoming quite agitated.
Q. While he was inside the cab?
A. While he was inside the cab, yes.
Q. When the door opened did he get out?
A. Well, there are other events before he got out.

The Court: What were they?

The Witness: Well, I am trying to get these in the right order. It is difficult because things happened quickly.

The Court: Yes?

The Witness: Officer Beckmann——

The Court: Did you see Policewoman Grace?

The Witness: Not at that time.

The Court: Go ahead.

[fol. 170] The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, "We are police officers." I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, "We are police officers."

I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him, what is the big idea, something like that. I don't remember my exact words.

As I recall then Officer Beckmann took the defendant by the arm——

By Mrs. Bulgrin:

Q. That was after the defendant got out of the cab, is that correct?

A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab.

[fol. 171] Q. That is just your impression?

A. The defendant was sitting right next to the door on the right-hand side in the back seat, and I didn't hear what Officer Beckmann said to the defendant.

Q. During the time these events, Mr. Smith, were happening, in which direction were you facing?

A. Well, I was facing toward the defendant and Officer Beckmann. I turned my head to see what was going on.

Q. You turned your head to the right, is that correct?

A. Yes.

Q. Did you watch the proceedings as they transpired?

A. Yes.

The Court: How could you tell the defendant was agitated?

The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated.

By Mrs. Bulgrin.

Q. Mr. Smith, did you know why the defendant was agitated at that time?

A. No.

Q. Could you see below the window on the right-hand side of the cab?

[fol. 172] A. Below the window?

Q. Outside the cab and below the window of the right side of the cab.

A. No.

Q. Could you see in the back seat below the level of the back of the front seat? Do I make myself clear?

A. No. Repeat the question.

Q. Could you see the rear floor of the cab just in front of the rear seat?

A. No. The only way I could have seen that would have been to have raised up bodily and looked over.

Q. Did you do that?

A. No. I had no occasion to.

Q. Did you get out of the cab yourself during this episode or did you stay in the cab?

A. No, I stayed in the cab at that time.

Q. After did the defendant get out of the cab? Was the defendant outside of the cab at any time after that?

A. Yes, the defendant got out of the taxicab.

The Court: When did you first see Policewoman Grace?

The Witness: That was later on.

The Court: When was that?

The Witness: Afterwards. I saw Policewoman Grace after the defendant broke away from Officer Beckmann.

[fol. 173] By Mrs. Bulgrin:

Q. Would you then, Mr. Smith, tell us what happened after the defendant got out of the cab?

A. He was protesting in an agitated manner, at least it appeared to be agitated to me—"What did I do? I didn't do anything. I didn't do anything."

And Officer Beckmann was endeavoring to hold him by his right arm, and Officer Beckmann had his revolver in his right hand, and the defendant kept edging away, trying to edge away, back away from Officer Beckmann, and pretty soon he broke away from him and ran around the corner.

Q. Did you happen to hear any of the conversation that took place between the defendant and Officer Beckmann outside of the car before he broke away?

A. Just that part I have re eated here already, that the defendant was protesting that he didn't do anything. He said that several times. I didn't hear anything that Officer Beckmann said.

Q. But you were still sitting in the cab at this point, is that right, Mr. Smith?

A. Yes.

Q. Did you see what happened to the defendant or Officer Beckmann after he broke away from the officer outside of your cab?

A. Well, the defendant disappeared around the corner.

[fol. 174] Q. Was the officer after him?

A. Shortly after he went around the corner Officer Beckmann went after him.

Q. Then did you see Policewoman Grace?

A. Yes.

Q. What happened with respect to her?

A. The first time I was conscious of her presence there at all was when she appeared alongside the right-hand side

of the taxicab opposite the front door, and she had a purse in one hand and her revolver in the other. She told me to stay right where I was and not move, and then she went after Officer Beckmann and the defendant.

Q. Was that the last of the transaction as far as you were concerned or did you see anything else happen between those three persons?

A. Well, that is a rather broad question.

Q. Did you go your own way at that time, Mr. Smith?

A. No.

Q. Did you wait there?

A. I waited there for a while. I turned the meter off on the taxicab. I didn't think the defendant would be back. I waited there and sometime in the next few minutes I heard a shot, what sounded like a gunshot. At just what point in the order here I am not sure, but pretty soon Officer Grace came back and instructed me to pull my cab around [fol. 175] the corner and go to State Street. The police car was parked directly behind by cab, so I had to do that to get out of the way, and she got in the police car and drove down State Street to an alley and up through an alley.

Q. Were you looking down the street—let me put it this way—did the officer and the defendant run toward the front of your cab and on past in the direction in which your car was facing? Did they run to the front of your car and then on down the street or into an alley?

A. Well, they ran south on State Street. My car was stopped at the pedestrian cross walk facing east on First.

Q. So they ran to your right?

A. Well they must have ran east a few steps at any rate rate, probably, and then proceeded south.

Q. Were you watching them as they went into the alley?

A. Well, I don't believe the alley was visible from that point.

Q. Did you watch them as they disappeared from your view?

A. Yes.

The Court: Did you hear Officer Beckmann say anything to Officer Grace?

The Witness: No.

The Court: Not at all while you were there?

The Witness: No.

[fol. 176] The Court: Was the rear door of your cab still open?

The Witness: Yes.

The Court: You do not know, or do you know, whether or not Officer Grace picked anything up off the floor of the cab?

The Witness: I do not know.

The Court: You do not know?

The Witness: I do not know one way or the other.

The Court: You could not see?

The Witness: No. I wasn't conscious of her presence until she came up alongside the cab.

The Court: You were a little excited yourself?

The Witness: Yes.

The Court: And maybe a little scared?

The Witness: Possibly.

Mrs. Bulgrin: That is all, your Honor. Thank you.

Cross examination.

By Mr. Grossman:

Q. Mr. Smith, did you ever see Officer Grace reach down to pick up any object from the rear floor of the cab in so far as you personally observed the events that occurred at the time you have just related?

A. No.

Q. From where you were sitting on the front seat was the torso of the defendant visible to you, that is, the part of his body above the legs, was that visible?

[fol. 177] The Court: When?

By Mr. Grossman:

Q. At the time you were sitting in the front seat of the cab watching the events that you related, from that position.

A. Well, let me say this, the lap and upwards of any passenger sitting in that part of the taxicab would be visible from the front if I were to look around.

The Court: Do you know whether or not you looked at him or were you interested in the policeman with his flashlight and badge and revolver?

The Witness: Well, I would say that the most prominent thing in my eyesight at the time was this revolver, which looked the size of a cannon.

By Mr. Grossman:

Q. Were you looking in the direction of the defendant at the time of these events, in the general direction of the defendant?

A. Just in the general direction, yes.

Q. Did you see the defendant take any object out of his pocket during the period he was inside the taxicab?

A. No.

Q. You did not see the defendant drop any object during the time he was inside the taxicab?

A. No.

[fol. 178] Q. Did you see Officer Beckmann flash his light on the floor or in the direction of the floor of the taxicab while the defendant was inside the taxicab?

A. No.

Q. Were the windows on the right-hand side of the cab rolled up so far as you recall?

A. The front window was rolled up because I customarily keep it rolled up unless I have an occasion to roll it down. I didn't pay too much attention as to whether the back window was up or not.

Q. In other words, it could have been up or not?

A. It is my impression that it was up.

Q. It is your impression it was up?

A. Yes. It is a vague impression.

Q. At the time Officer Beckmann opened the rear door of the cab, do you recall that he had any object in his hands? Did he have any object in his hands at the time he opened the rear door of the cab?

A. At the time he opened the door, I can't say just at what point in the order of these events he drew his revolver, but at some time before or after the door was opened, while Rios was still sitting in the cab, he drew his revolver.

Q. During that period he had put his flashlight away?

A. I suppose so. I never did see what happened to the flashlight.

[fol. 179] Q. But he wasn't carrying it during these subsequent events that you have related?

A. No.

Q. You didn't see him use the flashlight after he had used it to identify himself by flashing it on his badge?

A. No.

Q. When were you first aware of the presence of Policewoman Grace in or about the taxicab?

A. Well, shortly after Rios and Officer Beckmann disappeared around the corner.

Q. Where was she standing in relation to the cab at that time?

A. When I first saw her she was opposite the right front door of the taxicab alongside the right front door.

Q. You did not at any time see here opposite the right rear door of the taxicab?

A. I didn't see her but I wasn't particularly looking that way.

The Court: How far is it from the right front door to the right rear door?

The Witness: About two inches.

Of course, from the center of the door to the center of the front door and to the center of the back door would be maybe two feet.

[fol. 180] By Mr. Grossman:

Q. Did you see Officer Grace bend down toward the floor of the taxicab at any time when she approached the cab?

A. No, I didn't see her do that.

Q. When you first saw Officer Grace opposite the right front of the cab, did she have any objects in her hand?

A. Her purse and a revolver.

Q. Those were the only objects she had?

A. Those were the only objects I noticed.

Q. You did not see her carrying any rubber container of any sort at that time?

A. No.

Q. At the time you first saw Officer Grace, Officer Beckmann had already left the vicinity of the cab, is that correct?

A. That is right.

Q. And you did not hear any directions from Officer Beckmann to Officer Grace prior to the time he disappeared around the corner?

A. I didn't hear any.

Q. And he did not appear to the side, aside from your hearing he did not appear to be giving any directions to her at the time you saw him disappear around the corner, I gather?

A. Well, I can't testify as to what did not happen.

Q. But in so far as you were aware, you did not see him [fol. 180a] appear to be giving her any directions, whether you heard them or not?

The Court: How could he appear to be giving directions?

Mr. Grossman: I was referring to the fact he might have seen his lips moving facing in his direction, even though the conversation might have been inaudible.

The Witness: Well, I noticed a while back when Rios was talking, he was excited and speaking in a rather loud voice, protesting he didn't do anything. If Officer Beckmann said anything I didn't hear it, and it wasn't in as loud a voice as the defendant was using.

By Mr. Grossman:

Q. You didn't see Officer Grace until later in any event after Officer Beckmann had ceased speaking and was running?

A. That is right. I wasn't conscious of her presence around there until I saw her alongside the front of the cab.

The Court: Had you noticed in the rear view mirror that the car behind you had pulled up with a man and a woman when you stopped?

The Witness: At the intersection?

The Court: Yes.

The Witness: No. I may have been halfway conscious that there was an automobile behind me, but I hadn't been giving it any thought, because I pull up at hundreds of inter- [fol. 181] sections every night when I work.

By Mr. Grossman:

Q. There was no visible mark on the vehicle in which the police officers were riding to identify it as a police car, is that correct?

A. That is right.

Q. And neither Officer Grace nor Officer Beckmann was in uniform at the time of these events, is that correct?

A. That is correct.

Q. When Officer Beckmann drew his revolver, the size of a cannon, I believe you described it, were you yourself frightened?

Mrs. Bulgrin: Your Honor, I don't think that is material to this inquiry. It is just a waste of time.

The Court: Yes, it is material. It might have affected his powers of observation and he might have been thinking about that instead of other things.

Mrs. Bulgrin: Was the question answered, your Honor?

The Court: Apparently he has withdrawn it or abandoned it. He seems to be starting another question.

Mr. Grossman: I withdraw it in face of the objection.

Q. Mr. Smith, did you state to Officer Beckmann at the time he had drawn this revolver and was having this exchange of words with the defendant that he appeared to be [fol. 182] frightening the defendant? Did you make that statement to Officer Beckmann?

A. Words to that effect, yes.

Q. At that time he had drawn this revolver?

A. Yes.

Q. Did you ever hear Officer Beckmann state to the defendant prior to the time they disappeard from your view, "You are under arrest," or words to that effect?

A. No.

Q. The only evidence you had that Officer Beckmann was a police officer prior to the time that he disappeared around the corner was his statement to that effect, is that correct, that is, his statement that he was a police officer?

A. Plus his exhibiting his billfold.

Q. But you did not see his badge?

A. I did not see a badge.

The Court: The badge might have been in the billfold?

The Witness: Possibly.

The Court: That is the customary way the officers identify themselves to you, I mean plain-clothesmen, is that true?

The Witness: That is the first time I had been stopped by a plain-clothesman.

The Court: Heretofore you had been stopped by——

The Witness: Uniformed policemen.

The Court—uniformed policemen?

[fol. 183] The Witness: Yes. I don't know what the custom is, whether to exhibit the badge itself or just the billfold.

By Mr. Grossman:

Q. What did you observe Officer Beckmann do from the time the defendant got out of the cab until the time the defendant broke away as you related? What, if anything, did you observe Officer Beckmann do during that period?

A. He was trying to get the defendant to stand still, for one thing. They were standing out in the street, just alongside the cab, and Officer Beckmann had his revolver in his right hand and had ahold of the defendant by the defendant's right arm.

Q. Did you see Officer Beckmann appear to reach over as though attempting to retrieve an object from the floor of the taxicab at that time?

A. No.

On the other hand, I could't say that he could not do that either.

Q. But I was directing my question to the events as you observed them.

A. All right.

Q. Following the evening in question, the evening of February 18th, did any police officer relate to you events that were claimed to have transpired as of the evening of the 18th which you yourself had not observed?

[fol. 184] Mrs. Bulgrin: Your Honor, that would be hearsay and irrelevant.

The Court: It is outside the scope of the direct examination, not proper cross examination. Objection sustained.

Mr. Grossman: I am merely attempting to indicate, your Honor——

The Court: The objection is sustained, counsel.

Mr. Grossman: That concludes our cross examination.

The Court: Redirect?

Redirect examination.

By Mrs. Bulgrin:

Q. Mr. Smith, how long did the whole transaction take place from the time you picked up Mr. Rios until you saw the officer and Rios disappear from your view?

The Court: From the time he picked up these at First and Flower?

Mrs. Bulgrin: Yes.

Q. And the time you saw the officer and Rios disappear from your observation.

A. I don't know exactly what time they disappeared from view, but I can give you a fairly specific answer if you want to enlarge the period of time.

Q. Just give us your best estimate, Mr. Smith.

A. Twenty-five minutes.

The Court: What was the length of time between the [fol. 185] time you saw Officer Beckmann and the time they disappeared around the corner, how long was that?

The Witness: It wasn't very long. I would have to just make a rough guess.

The Court: Less than a minute?

The Witness: I would say perhaps about a minute.

Mrs. Bulgrin: What is that answer?

The Court: He says about perhaps a minute.

Mrs. Bulgrin: That is all.

Mr. Grossman: Just one further question.

Recross-examination.

By Mr. Grossman:

Q. This time period of about a minute was between which two events?

A. From the time Officer Beckmann appeared until he disappeared.

Q. From the time he first appeared to the time he disappeared?

A. Yes, sir. But that is a very rough estimate.

Mrs. Bulgrin: Your Honor, may this witness be excused? He has to go to work very shortly.

The Court: Yes, he may be excused.

(Witness excused.)

The Court: Next witness.

Mrs. Bulgrin: I would like to call Beverly Grace.

[fol. 186] BEVERLY P. GRACE, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Beverly P. Grace.

The Clerk: The address?

The Witness: 150 North Los Angeles Street, Los Angeles.

The Court: That is the Police Department building?

The Witness: Yes.

The Court: Proceed, counsel.

Direct examination.

By Mrs. Bulgrin:

Q. Is it Mrs. Grace?

A. Yes.

Q. What is your occupation, Mrs. Grace?

A. Policewoman for the City of Los Angeles assigned to the Juvenile Division.

Q. Were you on dduty the night of February 18, 1957?

A. I was.

Q. With whom were you working on that evening, Mrs. Grace?

A. Officer Beckmann.

Q. Is that Mr. Beckmann sitting here in the audience?

A. It is.

Q. Did you see the defendant Rios during that evening?

[fol. 187] A. I did.

Q. At approximately what time of day did you first see him?

A. Approximately 10:40, 10:45.

Q. Will you describe for us where you saw him and what he was doing at that time?

A. At First and Flower I first saw the defendant.

Q. Was he with anyone?

A. No.

Q. Will you tell us what he was doing at that time?

The Court: Where were you?

The witness: I was sittting in the police car.

The Court: At First and Flower?

The Witness: At First and Flower.

By Mrs. Bulgrin:

Q. Was Mr. Beckmann in the car with you?

A. He was.

Q. Now, will you tell us what the defendant Rios was doing at the time you first saw him when you were sitting in the police car?.

A. He was walking towards Flower in the parking lot adjoining an apartment building. He looked up and down the street, Flower Street. He walked back toward the taxicab and got in the taxicab.

Q. Did you see where he had come from before he looked [fol. 188] up and down the street?

A. He came out of an apartment building.

Q. And what did the taxicab do then after the defendant got into it, and where did it go?

A. It drove down First Street east on First Street.

Q. Was the defendant alone when he got into the cab?

A. Yes.

Q. When did you next see the defendant, Mrs. Grace?

The Court: What happened after that?

Mrs. Bulgrin: Yes.

Q. Tell us what happened after this.

A. I was driving the police vehicle. We followed the taxicab in which the defendant was seated to the intersection of First and State Street.

Q. What did you do there?

A. The taxicab was stopped at a signal. My partner, Officer Beckmann, got out of the police vehicle, approached on the right side and I approached on the left.

Q. For the record, was this a red light that the cab stopped for?

A. It was.

Q. After you both alighted from the police vehicle, what happened? Just describe in your own words what happened.

A. I was standing on the left side of the taxicab, I was aware of the defendant getting out of the cab, and of a [fol. 189] struggle going on.

I went around to the rear of the cab, observed the struggle——

The Court: On the right side?

The Witness: On the right side of the taxi.

By Mrs. Bulgrin:

Q. Between whom?

A. My partner Officer Beckmann and the defendant.

Q. Was the defendant outside of the cab when you approached to the right-hand side?

A. The defendant was outside.

Q. Was the car door open? Was the taxicab right rear door open?

A. It was.

Q. Prior to the time you approached the right-hand side of the taxicab, Mrs. Grace, had you been able to see what was happening on that side of the cab? Could you see what had been happening on that side of the cab between Officer Beckmann and the defendant?

A. No. I was aware of some circumstance going on. I couldn't see.

Q. As you approached, did Officer Beckmann and the defendant Rios have any conversation with each other? Were any words spoken in the defendant's presence that you heard?

A. Yes.

[fol. 190] Q. Will you tell us what they were?

A. I heard my partner Officer Beckmann tell the defendant that he was under arrest. I heard him tell him he was under arrest for suspicion of narcotics.

Q. Yes?

A. I heard the defendant say words to the effect of "What did I do" and "I didn't do anything."

Q. Yes?

A. That is all.

The Court: Did Officer Beckmann say anything to you?

The Witness: Yes, he did.

The Court: What did he say to you?

The Witness: He pointed at the floor of the taxi and said, "Pick it up," "Pick up the stuff," something to that effect.

By Mrs. Bulgrin:

Q. Will you look at Exhibit, I believe it is 1-A or 1-B there in front of you, Mrs. Grace, and tell us if you picked up that object from the floor of the taxicab in response to Officer Beckmann's request.

A. (Examining exhibit) Yes, I did.

Q. Where did you find it exactly in the taxicab, Mrs. Grace?

A. It was just to the right of the middle floor in the taxicab, the right rear.

[fol. 191] The Court: Toward the back of the front seat?

The Witness: About in the middle.

By Mrs. Bulgrin:

Q. Was that on the floor right in front of the back seat, is that what you mean?

A. On the floor of the back seat.

Q. After you picked it up, what did you do with it, Mrs. Grace, that is, as to Exhibit No. 1-A? What did you do with Government's Exhibit 1-A for identification after you picked it up? Did you put it in your purse or pocket or hold it in your hand, or what did you do with it?

A. I put it in my purse, this purse (indicating).

Q. What did you do with it thereafter, Mrs. Grace?

A. I had it in my possession until I turned it over to my partner Officer Beckmann at Second and Cummings.

Q. After you picked up that object from the floor of the taxicab, will you please tell us what you did?

A. I informed the cab driver to wait right there. I ran down the street——

The Court: By this time Officer Beckmann and the defendant had gone down the street?

The Witness: They had run down the street.

By Mrs. Bulgrin:

Q. Was Officer Beckmann in back of the defendant following him down the street?

[fol. 192] A. Yes.

Q. Did you hear any conversation or any words from Officer Beckmann with respect to shooting?

A. I don't get the question.

Q. Did you hear any words after they left the taxicab spoken by Officer Beckmann with respect to shooting, any words that were spoken to the defendant Rios in connection with his halting or shooting or anything of that sort?

A. The only word I heard was "Halt."

Q. Will you tell us now what happened after they went on down the street? What did you do?

A. I told the cab driver to wait. I started running, walking-running, toward the alley.

Q. Did you see Officer Beckmann and the defendant in the alley?

A. No, I did not.

Q. When did you next see them and where?

A. At the corner of Second and Cummings.

Q. Will you describe what you saw there in connection with the defendant and Officer Beckmann?

A. The defendant was lying at the curb.

The Court: Did you go to the alley? Cummings Street is the next street beyond State Street, is it?

The Witness: Yes.

The Court: And the alley is the alley that goes from [fol. 193] State to Cummings Street?

The Witness: Yes.

I walked part-way through the alley. I turned and I walked back, told the cab driver to pull his car around the corner and wait.

I got in the police vehicle and drove through the alley to the corner of Second and Cummings.

The Court: And there you saw——

The Witness: There I saw the defendant.

The Court: —Beckmann and the defendant?

The Witness: Yes.

By Mrs. Bulgrin:

Q. About how far away was that from the point where you had stopped behind the cab at the red light, Mrs. Grace?

A. I would say approximately two blocks.

Q. Will you describe what you saw at the corner of Second and Cummings?

A. I saw the defendant lying at the curb and Officer Beckmann standing near him.

Q. Did he have his gun still drawn?

A. No, he did not.

Mrs. Bulgrin: That will be all, your Honor.

The Court: I think perhaps we will have the afternoon recess.

The jury will remember the admonition.

[fol. 194] Mr. Grossman: Before the recess, as a means of possibly saving time, may we approach the bench for just a moment?

The Court: Yes.

(The following proceedings were had between court and counsel, with the defendant, at the bench outside the hearing of the jury:)

Mr. Grossman: I thought it would expedite matters in view of the fact that we are planning, for purposes of cross examination, to get the statement of the witness produced by the Government if the Government doesn't have them here now.

Mrs. Bulgrin: I don't think we have a thing she made.

Mr. Grossman: She mentioned an arrest report, your Honor.

Mrs. Bulgrin: I don't think that she made it up.

Mr. Grossman: I thought it would expedite matters if I asked for it now.

The Court: (Addressing the witness) Did you make a separate arrest report?

The Witness: No.

The Court: Did you join in making the arrest report with Officer Beckmann?

The Witness: Partly, yes.

Mrs. Bulgrin: How do you mean, partly?

The Witness: I reconstructed my part.

The Court: Who wrote it, Officer Beckmann or you?

[fol. 195] The Witness: Officer Beckmann typed it.

The Court: Officer Beckmann typed it?

The Witness: Yes.

Mr. Grossman: One further request, your Honor. On this motion I intend to move that we also be furnished a copy, under the Jencks ruling, of the transcript of the testimony of this witness before the grand jury. This is an area as to which the application of the Jencks rule is still somewhat applicable.

Mrs. Bulgrin: There is no showing that she testified before the grand jury.

The Court: Just a moment.

The jury will be excused. You will remember the admonition. The court will remain in session and we will make our motions from the lectern down there and settle this matter.

(Whereupon the jury retired from the courtroom.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: You may proceed.

Mr. Grossman: If the court please, at this time I would like to move that any oral or written statements made by this witness to the police, including a transcript of the testimony of this witness before the grand jury—

The Court: That was not made to the police. Let us make one motion at a time.

Mr. Grossman: First I would like to move that any statement of this witness to any officer or agent of the [fol. 196] Federal Government be produced for examination.

The Court: Did you make any statement in writing to any officer of the Federal Government?

The Witness: No.

The Court: Did you make any statement in writing other than your collaboration with Officer Beckmann in the preparation ot the police report?

The Witness: No.

The Court: You have had a copy of the police report, counsel.

Mr. Grossman: I had a brief examination at a prior

time, yes, but I have not been furnished a copy for examination in connection with this proceeding.

I had suggested to the Government that time might be saved if I would be furnished one prior to the proceedings, but they indicated they would not do so unless by order of the court.

Mrs. Bulgrin: We indicated, your Honor, that the defendant's counsel could take advantage of any motion he would make, not as he suggests.

The Court: He is entitled to the same ruling now as I made before. He is entitled to have a copy of the police report if this witness corroborated in making it. I do not know which part is hers.

So far he would not be entitled to the portion which [fol. 197] I folded under the other day and did not give him access to because that witness has not been called.

It is your intention to call Officer Beckmann too, is it?

Mrs. Bulgrin: Yes, sir.

The Court: Very well.

Mrs. Bulgrin: Your Honor, part of the report deals with what is known as officer's statement.

The Court: I read the report the othe day. It is the same report, is it not?

Mrs. Bulgrin: Yes, your Honor.

The Court: It seems to me that everything is either a prior statement of Officer Beckmann or of this witness.

Mrs. Bulgrin: I noticed, your Honor, that I overlooked last time that there are statements here with respect to what the cab driver had told them and that would be outside the scope of her testimony, I believe, and Mr. Beckmann's testimony.

Would the court care to see a copy of this?

(The document referred to was passed to the court.)

The Court: Is this the same one you gave me before?

Mrs. Bulgrin: Yes.

The Court: Let me look at it again. I read it all the way through the last time.

Mrs. Bulgrin: There are portions that relate to Witness No. 1 who I believe is the cab driver.

[fol. 198] Mr. Grossman: He has been a witness here also.

Mrs. Bulgrin: They were not his statements, however.

The Court: I do not remember anything in here about the cab driver.

Counsel, in view of my ruling the other day I wish you had rewritten the portions which I indicated that the defendant was allowed to see. I do not think the defendant is allowed to see all of these reports and go on a general fishing expedition exploratory of what the Government's evidence is. It is solely for the purpose of impeachment and to determine whether or not there is a prior inconsistent statement made by the witness who is on the stand.

Now, you have not eliminated that in this report and I do not know how to go about doing it.

Mrs. Bulgrin: You mean the paragraph that you believed would not be pertinent?

The Court: The one paragraph that I deleted the other day, or attempted to delete.

Mrs. Bulgrin: Actually, your Honor, we wouldn't have any serious objection, now that the witness has come and gone, since they aren't his statements and we wouldn't have any serious objection to counsel having the report with the exception of that part—I mean, if the court is going to order that the Government exhibit it to him.

The Court: I construe the Jencks decision to require me [fol. 199] to let the defendant have copies of written statements when a witness is produced. Now if you want to break it down by giving general copies of these statements, all right, but as far as I am concerned, as a judge, I am not going to compel the investigative agencies to disclose their whole files to defendants. It is only when a witness is called to the stand and testifies that then they are entitled to that witness' words and to nothing else.

Now you want this report. You saw it the other day.

Mr. Grossman: I glanced at it briefly. I have not had a chance to examine it more thoroughly. I had suggested to the Government in order to save time today at least in so far as those portions we were permitted to see the other day, that they be furnished to us in advance. The Government having it ready, it would have saved some time, but the Government said they wanted a formal motion so I want an opportunity to inspect it now.

Mrs. Bulgrin: Mr. Grossman saw it the other day for a half-hour or three-quarters of an hour and took considerable time in reading it.

The Court: It was about 20 minutes.

Mr. Grossman: I might say I was particularly concerned with the limited portion of it at that time and a good deal of it was not relative to the motion we have before us.

I might suggest as a means of saving time if it will be [fol. 200] made available to us for inspection perhaps cross-examination could be resumed with the further cross examination, say, tomorrow morning after giving us a chance to look at it after court recesses, if that is agreeable.

Mrs. Bulgrin: I can eliminate all parts of the report, your Honor, which do not relate to this witness' testimony.

The Court: I do not know what portion of the report this witness made. She said she collaborated on it. I do not know what portion is her report and what portion is not.

Mrs. Bulgrin: I don't either, your Honor.

The Court: Although it apparently is all her report because her signature appears at the bottom of it.

Let me have your stapling machine, Mr. Clerk.

For the purposes of the record, the United States Attorney has handed to the court what purports to be an arrest report, consisting of four sheets. I have examined the report. It is signed in typing by Officer D. W. Beckmann and B. Grace.

I have folded over the bottom of a portion of page 2 which contains purported statements made to either one or the other officers by some other person who has not yet been called to the witness stand.

Likewise all of page 3 is devoted to statements by other persons, and the top line of page 4.

I have folded them over and stapled them and in that condition I will give them to defense counsel for examination. [fol. 201] Mrs. Bulgrin: Thank you, your Honor.

Mr. Grossman: I also had another motion to make, if the court please.

The Court: I will hear your other motion.

Mr. Grossman: I would like to move at this time that in light of the Jencks decision that the defendant be furnished a copy of the transcript of the testimony of Officer Grace

and in any event Officer Beckmann's testimony, as presumably he will testify, of their testimony before the Federal grand jury in this case.

The Court (Addressing the witness): Did you testify before the grand jury?

The Witness: I did not.

The Court: That is the end of your motion. Your motion is denied. She made no statement before the grand jury.

Mr. Grossman: That is in so far as this witness is concerned.

The Court: Very well. We will have a short recess.

(Short recess.)

The Court: The record will show the defendant is present in person and by counsel, and the jury is present and each one in his or her place.

Proceed.

Mr. Grossman: Thank you, your Honor.

[fol. 202] Beverly P. Grace, called as a witness by and on behalf of the Government, resumed the stand and testified further as follows:

Cross examination. (Continued)

By Mr. Grossman:

Q. Policewoman Grace, did you get off the police vehicle at the same time as Officer Beckmann got out of the car?

A. Approximately, within a matter of seconds.

Q. Did you approach the taxicab on the left side at approximately the same time that Officer Beckmann approached it on the right?

A. Yes.

Q. Did you have any object in either of your hands at that time?

A. No.

The Court: Not even your purse?

The Witness: I carry it on my shoulder. It has a shoulder strap.

By Mr. Grossman:

Q. At the time you first approached the cab, where did you stand in relation to the cab?

A. Right about the middle, the middle point between the two windows.

Q. Were you standing on the left side of the cab approximately opposite the position in which Officer Beckmann was [fol. 203] standing on the right side of the cab at that time?

A. Yes.

Q. From the time you first approached the cab on the left side until the time the defendant left the cab, isn't it a fact that you were looking in the general direction of the defendant?

A. Yes.

Q. During that period did you see the defendant take any object out of his pocket?

A. No.

Q. Did you see the defendant drop any object on the floor or in the direction of the floor of the taxicab?

A. No.

Q. Did you see Officer Beckmann slash his light on the floor of the taxicab?

A. I saw a flash of light.

Q. Did you see him flash his light to identify himself, flash it in the direction of his badge, or did you simply see him flash his light? At any rate, you said you saw him flash his light. I will let you tell the circumstances under which you saw him flash his light, if you can.

A. I saw a flash of light. I know his general procedure to flash his light on his badge.

Mr. Grossman: I move to strike the last portion with regard to the general procedure.

[fol. 204] The Court: That may be stricken.

By Mr. Grossman:

Q. In other words, you do not recall seeing the officer flash his light on the floor of the taxicab in so far as you recall?

A. No.

Q. Did you see any object on the floor of the taxicab during this period?

The Court: During what period?

By Mr. Grossman:

Q. During the period from the time you first approached the cab on the left side until the defendant left the cab?

The Court: During the period you were on the left side of the cab?

The Witness: Yes.

The Court: Did you see anything on the floor?

The Witness: No.

By Mr. Grossman:

Q. You remained on the left side of the cab until after the defendant got out of the cab?

A. I don't recall if it was until after or when he was getting out.

Q. You came around to the right side of the cab, and at that time was the defendant in or out of the cab?

A. He was out of the cab.

[fol. 205] The Court: That is when you got around there?

The Witness: That is when I got around there.

By Mr. Grossman:

Q. How long did it take you to get around the right side of the cab, just a matter of a few seconds?

A. A few seconds.

Q. You testified that you were unable to see what transpired between Officer Beckmann and the defendant on the outside of the right of the cab, is that correct, at the time you were on the left of the cab and you were unable to see what was transpiring between them on the outside of the right of the cab after the defendant alighted from the cab, is that correct?

A. Yes.

Q. Refreshing your recollection now, do you recall that as a matter of fact you were standing on the left side of the cab until after the defendant had gotten out of the taxicab?

A. I don't recall.

Q. Would you tell us why you were unable to see what transpired on the right side of the cab while you were on the left side?

A. Well, I am rather tall. I wasn't bending over looking through the window.

Q. But you were looking in the direction of the defend-
[fol. 206] ant?

A. Yes.

Q. Did you have any difficulty in seeing because of the light conditions in so far as they were a factor at the time?

A. No.

Q. It was at night, though, was it not?

A. Yes.

The Court: The intersection was lighted?

The Witness: It was lighted.

The Court: And the street was lighted?

The Witness: The street is lighted.

By Mr. Grossman:

Q. When you came around to the right side of the cab, where was Officer Beckmann standing?

A. Approximately opposite the rear door in the middle.

The Court: Was he standing or was he

The Witness: He was grappling.

The Court: He was grappling with the defendant?

The Witness: Yes.

By Mr. Grossman:

Q. He was grappling with the defendant with both arms?

A. I don't recall.

Q. You don't recall?

A. I don't recall if he was using both arms or not.

[fol. 207] Q. Do you recall if he had a gun in his hand or not at the time?

A. I don't recall at that time.

Q. Do you recall that he had any object in either of his hands at that time?

A. He had the defendant in one hand.

Q. In one hand?

A. That is right.

Q. And he was struggling using only one hand at the time, is that correct?

A. I know of one hand.

Q. At least one hand and possibly both?

A. Yes.

Q. Did you see Officer Beckmann make any effort to retrieve any object from the floor of the cab at that time?

A. No.

Q. Prior to the time Officer Beckmann spoke to you, did you see any object on the floor of the cab?

A. No.

Q. You testified that Officer Beckmann pointed at an object. Will you just describe for us briefly his manner in which he pointed at the object?

A. Well, he was holding on to the defendant, he was twisting his shoulders and he says, "Grab it," "Pick up the object."

[fol. 208] Q. Which way was Officer Beckmann facing at that time?

A. He was facing toward the cab. That would be north.

Q. Do you recall which hand he pointed with?

A. No.

Q. At the time you came around to the right side of the cab, did you have any object in your hand?

A. No.

Q. You did not have a gun in your hand either at that time?

A. Not at that time.

Q. After coming around to the right side of the cab, did you approach the cab driver?

A. After the defendant and the officer had left the scene.

Q. At that time did you have a gun in either of your hands?

A. I possibly could have had at that time.

Q. Do you recall whether you did or not?

A. I don't recall.

Q. Do you recall if you had any object in either hand at that time?

A. I had the Exhibit 1-A.

Q. You had that in your hand at the time you approached the cab driver?

A. Yes.

[fol. 209] Q. Did you carry it in your hand over to the point at which you met up again with Officer Beckmann?

A. No.

Q. What did you do with it?

A. I put it in my purse at some time.

Q. This was after you approached the cab driver?

A. It possibly was.

Q. But you did testify, am I correct, that you approached the cab driver with this object in your hand?

A. I don't recall if I did or not.

Q. Do you recall with which hand you retrieved the object from the floor of the cab?

A. No.

Q. Do you recall whether you retrieved an object from the floor of the cab?

A. Yes.

Q. Do you recall where the object was laying on the floor of the cab?

A. Yes.

Q. Was it laying toward the front or rear of the floor of the cab?

A. It was laying approximately about in the middle between the rear and the front.

Q. In the middle of the floor of the cab?

A. A little to the right of the middle of the cab, approxi-[fol. 210] mately in the middle of the floor of the cab between the front and rear seat.

Q. What division of the Police Department are you with, Officer Grace?

A. The Juvenile Division.

The Court: You are authorized to make arrests as a juvenile officer?

The Witness: Yes.

The Court: Subject to any assignment that they choose to give you?

The Witness: Yes.

By Mr. Grossman:

Q. Did the defendant appear to be a juvenile to you at the time you first saw him?

A. No.

Q. Prior to the first time you saw the defendant on February 18th, did you have any idea as to the identity of the defendant?

A. No.

Q. Do you recall the location of the apartment house that you say the defendant got out of at the time you first saw him in the vicinity of First and Flower?

The Court: Let me hear that question again.

(The question referred to was read by the reporter as follows:

[fol. 211] ("Q. Do you recall the location of the apartment house that you say the defendant got out of at the time you first saw him in the vicinity of First and Flower?")

The Witness: Yes.

By Mr. Grossman:

Q. What was that?

A. It is the northwest corner of First and State.

The Court: First and State?

The Witness: Correction. First and Flower Streets.

By Mr. Grossman:

Q. From the point at which your police car was parked, was the alley that you refer to running between State and Cummings visible to you?

A. Not from the police vehicle, I don't believe.

Q. At the time you were standing outside the cab, from the cab was it visible to you?

A. Not unless you knew it was there.

Q. Let me reframe my question: Assuming you were looking for the alley, could you see the alley from that point?

A. Would you brief me on the point?

Q. From a position standing on the right side of the cab.

A. From the front of the cab?

Q. You could see the alley?

[fol. 212] A. Yes.

Q. At approximately what point did Officer Beckmann

and the defendant pass out of your view after they proceeded away from the cab? About how far had they traveled before they disappeared from your view after they got out of the cab?

A. When they were in the alley.

Q. You saw them in the alley?

A. No. That is when they passed out of my view.

Q. When they entered the alley?

A. Yes.

Q. And that was approximately how far from the cab?

A. I am no judge of distances.

Q. Just as best you can approximate it.

The Court: Half a block?

The Witness: A quarter of a block; nearer a quarter of a block.

By Mr. Grossman:

Q. But you did see the defendant, you were able to see the defendant for a period after they went aronnd the corner of the intersection of First and State, is that correct, up until the time they got into the alley?

The Court: That has been asked and answered. She said she did, that she saw them until they disappeared in the alley.

Mr. Grossman: That concludes our cross examination of this witness, your Honor.

[fol. 213] The Court: Redirect?

Mrs. Bulgrin: No, your Honor.

The Court: Step down.

(Witness excused.)

Mrs. Bulgrin: I would like to call Officer Beckmann.

D. W. Beckmann, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: D. W. Beckmann; B-e-c-k-m-a-n-n.

The Clerk: And your address, please?

The Witness: 1238 North Everett Street, Glendale.

Direct examination.

By Mrs. Bulgrin:

Q. What is your occupation, Mr. Beckmann?

A. I am a City of Los Angeles police officer assigned to the Georgia Juvenile Division.

Q. Were you so assigned on February 18, 1957?

A. Yes, ma'am.

Q. What particular division of the Juvenile Bureau of your Police Department were you assigned to on that night?

A. Central Division in the area of First and Flower.

Q. Did you have anything to do with narcotics cases in particular on that date?

A. Yes.

[fol. 214] Q. Were you assigned to narcotics cases?

A. I wasn't assigned to a specific narcotics case. I work narcotics in the area.

Q. That is what I mean.

A. Yes.

Q. Had you previously had any assignments involving narcotics cases, Mr. Beckmann?

A. Yes.

Q. For how long a period of time?

A. Well, I worked primarily narcotics for four years in the Newton Division, and then while being assigned to Juvenile I also worked narcotics in Juvenile.

The Court: How many arrests have you made?

The Witness: Throughout my career on the department?

The Court: Yes, for narcotics.

The Witness: Well, in the last five years I would say roughly at least a hundred or more a year.

The Court: Does the vicinity of First and Flower Streets have a reputation as being a hangout for distributors or users of narcotics?

The Witness: Yes, sir.

The Court: It it good or bad?

The Witness: Bad.

By Mrs. Bulgrin:

Q. Now, Mr. Beckmann, who were you working with on

[fol. 215] that night?

A. Policewoman Grace.

Q. Is that the policewoman who preceded you on the stand and testified in this case?

A. Yes, ma'am.

Q. Did you see the defendant Rios on that evening?

A. Yes, ma'am.

Q. When did you first see him, Mr. Beckmann? Tell us where he was and where you were.

A. I observed the defendant in the parking lot on the northwest corner of First and Flower. I was just south of the intersection on Flower Street parked in a police vehicle, an unmarked vehicle.

I saw the defendant walk out to the sidewalk, look up and down Flower Street and look down First Street, and then walk back into the lot and get into the taxicab that was sitting on the parking lot.

Q. Will you tell us where the taxicab went and what you did after that?

A. The defendant entered the taxicab on the parking lot, the driver left the lot, turned southbound on Flower and and eastbound on First Street.

We then followed the taxicab, my partner Policewoman Grace was driving the police vehicle, and we followed the taxicab to First and State Streets.

[fol. 216] Q. Now, at First and State Streets, will you tell up what happened there, please, Officer Beckmann?

A. At First and State Streets the cab was stopped for a traffic light. There was a vehicle in front of the cab.

Q. Was it a red traffic light?

A. Yes. The cab was in the lane next to the double line. My partner drove up in back of the cab. I alighted from the right side of the police vehicle, my partner, Officer Grace, alighted from the left side of the vehicle.

I approached the cab on the right side, my partner on the left side.

I had my badge in my left hand and a flashlight in my right hand——

Q. Excuse me, Officer Beckmann.

Did she reach the right-hand side of the taxicab at the same time you did or not?

A. She was on the left side of the taxicab, I was on the right side.

Q. Now, will you tell us what happened as you stood on the right-hand side of the taxicab?

A. When I reached the right side of the taxicab I exhibited my badge and showed my flashlight on the badge to the cab driver and the defendant, and told them I was a police officer.

At that time the defendant took an object out of his [fol. 217] pocket, Object 1-A, took the object out of his pocket, out of a blue jacket, out of his right pocket, and dropped it on the floor of the cab.

Q. I wonder if you can demonstrate for the jury's benefit how he reached into his pocket and let it drop?

A. He had a zipper jacket on with a pocket.

Q. Do you recall which arm he used?

A. The right arm. He took it out of his pocket and dropped it on the floor (demonstrating).

Q. Was it the arm that was next to you as he was sitting in the cab?

A. Yes.

Q. Did he reach across his chest into his jacket with his right arm?

A. No, he reached into the pocket on the right side, a patch pocket on the right side.

Q. How did he let it drop? Did he let it drop from the pocket or did he put it in front of him?

A. No, he took it out of the pocket and dropped it like this (demonstrating).

Q. How long after you arrived did he do that?

A. Approximately seconds after I had identified myself. He looked in my direction, then took the object out of his pocket and dropped it.

The Court: All this occurred during the length of time [fol. 218] that it took you to say, "I am a police officer," and flash the light on your badge?

The Witness: Yes, sir.

By Mrs. Bulgrin:

Q. After he did that, Officer, what happened?

A. When he did that he grabbed the door of the cab and attempted to open it, and I grabbed the door of the cab and attempted to open it also.

Q. Did it come open?

A. Yes. The defendant alighted from the cab and I grabbed the defendant by the arm with my left hand.

He kept pulling away from me and kept saying, "I have not done anything, I have not done anything."

At that time I told him he was under arrest for suspicion of narcotics and I attempted to reach down with my right hand and retrieve the object he had dropped on the floor.

He kept pulling away and I couldn't pick up the object, and he kept saying, "I haven't done anything, I haven't done anything," and I kept saying, "You are under arrest, stop struggling."

I at that time pulled my gun and told him again he was under arrest for narcotics.

When I did this, while the struggle was going on, my partner, Policewoman Grace, came around the vehicle and I pointed to the object in the cab and told her to pick it up.

[fol. 219] I think I told her to pick it up as soon as she got around the cab, and I think before I pulled my gun out. However, I did point to the object and told her to pick it up and I kept trying to hold onto the defendant with my left hand.

The defendant then took off, running eastbound on First Street and southbound on State Street. I was pursuing him with my gun in my right hand, telling the defendant to stop, that he was under arrest, that if he didn't stop I would shoot.

I then chased the defendant into the alley that runs parallel with First Street, between First and Second. I chased him down the alley at that time.

Q. Excuse me, Officer. May I interrupt you here?

With respect to Government's Exhibit 1-B, had you ever seen a container, a similar rubber container——

The Court: That is 1-A.

Mrs. Bulgrin: Thank you, your Honor.

Q. —1-A, which is the rubber container filled with a whitish powder, had you ever seen a similar colored container of that sort containing heroin during the course of your duties involving narcotics assignments previously?

Mr. Grossman: I object to this line of inquiry as involving a matter which is not directly pertinent to any issue before the jury in this proceeding.

[fol. 220] The Court: Overruled.

Your question is whether or not he is familiar with whether or not that is a commonly used means of carrying heroin?

Mrs. Bulgrin: Yes. That is my question.

The Witness: Yes, it is.

Mrs. Bulgrin: All right.

Q. Now, I believe you were describing the fact that you were chasing the defendant. Would you continue to tell us what happened in that respect, please?

A. The defendant continued to run down the alley and I fired a shot at the defendant. When I fired the shot at the defendant I saw the defendant stagger and I caught up with the defendant.

The defendant turned around at that time and I observed that he had blood on his left front abdomen.

At that time he told me, "Go ahead and kill me, I want you to kill me, Officer."

I said, "Stop struggling. You are hurt. I want to take you to the hospital."

He replied, "I want you to kill me. Go ahead and kill me."

I put my gun away and again told him to stop struggling.

At that time he tried to kick me between the legs. When he did this I took my sap out of my pocket, attemped to sub-[fol. 221] due the defendant with my sap. The defendant and I continued to struggle. He broke loose and ran eastbound through the alley again. I caught up with him. He turned and attempted to fight me again.

I attempted to strike him with my sap. When I attempted to strike him with my sap he would get his right arm up and I was unable to.

Then he would break loose again and run again. When we got to the corner of the alley at Second and Cummings I again attempted to subdue him with my sap and lost my sap. Then I chased him to Second and Cummings, to the northeast corner of Second and Cummings, where I managed to get a choke hold on him and subdued him. At that time he fell to the gutter.

At that time I then took him into physical custody and shortly thereafter my partner came and met me there at Second and Cummings.

Q. Did you then take him out to the hospital after that time?

A. I immediately called an ambulance. The ambulance then transported him to Georgia Street Receiving Hospital. I accompanied him to Georgia Street.

From there he was taken to the General Hospital prison ward.

Q. By the way, was he alone in the taxicab at the time you approached the cab, and during this transaction, except [fol. 222] for the cab driver, of course?

A. Yes, he was alone.

Q. Was the cab driver sitting throughout all of this, so far as you know, in the front of the cab behind the driver's wheel?

A. Yes, he was in the front.

Mrs. Bulgrin: At this time, your Honor, I will offer in evidence Government's Exhibit 1-A, which is the rubber container with the powder, together with the other two envelopes which are Exhibits 1 and 1-B.

Mr. Grossman: May we approach the bench for a moment?

The Court: Yes.

(The following proceedings were had between court and counsel at the bench, with the defendant present, outside the hearing of the jury:)

Mr. Grossman: Simply for the record, I wish to object to the receipt of this evidence on the grounds heretofore set forth in our motion which has heretofore been denied by this court.

The Court: Objection overruled.

(The following proceedings were resumed in open court:)

The Court: The exhibits are admitted in evidence.

(The objects referred to were received in evidence as Government's Exhibits Nos. 1, 1-A and 1-B respectively.)

The Court: Does that finish your direct examination? [fols. 223-225] Mrs. Bulgrin: Yes, sir.

The Court: We will recess until tomorrow morning at 10:00 o'clock. The jury will remember the admonition.

(Whereupon, at 4:05 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, July 24, 1957.)

[fol. 226] Los Angeles, California, Wednesday, July 24, 1957, 10:00 A.M.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: Case on trial.

The Clerk: 26,019, United States of America v. Jose Terones Rios for further jury trial.

Mr. Grossman. The defendant is ready, your Honor.

Miss Bulgrin: The Government is ready.

The Court: The record will show the defendant Rios is present in person and by counsel and the jury is present and each one in his or her place.

Do you have your proposed instructions?

Miss Bulgrin: No, I don't. I will have them for the court at recess.

The Court: All right.

Officer Beckmann, I think, was on the stand.

DUWAYNE BECKMANN, called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Miss Bulgrin: If your Honor please, Mr. Grossman is willing to stipulate that he has in his possession at this time the police officer's report which was handed to him yesterday by the court.

The Court: And you have handed it to him now?

[fol. 227] Miss Bulgrin: Yes, in the same condition it was handed to him yesterday, your Honor. It has been returned to him this morning for use during his cross examination and he is willing to stipulate that he has it in his possession again.

The Court: And in the same condition which I indicated it to be when I handed it to him yesterday.

Miss Bulgrin: That is correct. Is that so stipulated, Mr. Grossman?

Mr. Grossman: So stipulated

Cross-examination.

By Mr. Grossman:

Q. Officer Beckmann, when you first saw the defendant in the vicinity of First and Flower did you have any idea as to his identity?

A. No.

Q. Incidentally, I believe you testified that you were assigned to the Juvenile Division of the police department?

A. Yes.

Q. And at the time of the arrest of the defendant you were not assigned to the Narcotics Division of the police department?

A. No.

Q. At approximately what time did you and Officer Grace pull up behind the taxicab in which the defendant [fol. 228] was a passenger at First and State Streets?

A. It was approximately 10:50 p.m.

Q. And in what manner did you identify yourself to the defendant?

A. With my—I had my badge in my left hand and my flashlight in my right hand and told him I was a police officer.

Q. Do you recall whether the windows were open on the right side of the cab—were opened or closed at the time you identified yourself?

A. I can't recall.

Q. You don't recall that?

A. No.

Q. Approximately where were you standing when you identified yourself to the defendant in relation to the cab?

A. Near the right rear window—near the right rear window, near the window on the right side by the rear seat.

Q. Where you standing at approximately the center of the right side of the cab?

A. Yes.

Q. Were you standing approximately opposite the position in which Officer Grace was standing on the left side of the cab?

A. I don't recall just where she was at that time. I knew she was on the left side of the cab but I wasn't [fol. 229] watching Officer Grace; I was watching the defendant.

Q. And at the time you were identifying yourself to the defendant by flashing your light on the badge, that was the time at which you saw the defendant drop the package, is that correct?

A. Shortly thereafter. After I identified myself he did this.

Q. Well, is it not a fact that it was when you identified yourself to the defendant that you saw him drop the package?

A. I identified myself and then I saw the defendant drop the package.

Q. Did you or did you not see him drop the package at the time while you were in the process of identifying yourself?

The Court: The question has been asked and answered three times.

By Mr. Grossman:

Q. Perhaps I can refresh your recollection on that, Officer Beckmann.

Did you not testify under oath on March 12, 1957 as follows——

The Court: Show it to him before you read it.

Mr. Grossman: Very well.

The Court: Do you have a transcript?

Mr. Grossman: I have a copy which might be a photostatic copy of the transcript.

The Court: Any objection to the use of it?

[fol. 230] Miss Bulgrin: No. But I would like to know which page he is reading from.

Mr. Grossman: I will indicate that when I show it to the witness. I am referring to page 6, lines 8 through 10.

(Document handed to the witness.)

The Witness: Yes.

By Mr. Grossman:

Did you not testify under oath at that time as follows:

"When I identified myself to the defendant he reached in his jacket pocket, a blue jacket, and dropped a white object on the floor."

The Court: That is just what he got through testifying to here, counsel. There isn't any inconsistency with that statement and his statement here.

Mr. Grossman: Well, your Honor, I believe he is now testifying that he first identified himself and at the previous time he said when he identified himself. I think the jury can judge whether there is any inconsistency.

By Mr. Grossman:

Q. Did you, Officer Beckmann, was it you or the defendant who jerked open the door of the cab on the right side?

A. We both—it was fairly close—we both opened the door. I attempted to open the door and the defendant attempted to get out of the cab.

Q. Well, but who actually—someone actually opened [fol. 231] the door of the cab. Was that you or the defendant who actually opened the door of the cab?

A. Well, I could have and he could have—it happened so quickly, sir.

Q. You don't recall whether you opened the door of the cab?

A. I recall the door was opened and the defendant tried to get out.

Q. But you don't remember whether you opened it?

The Court: Counsel, he testified that he and the defendant were both trying to open the door. Now, are you asking him whose application of strength on the mechanism it was that turned the latch?

Mr. Grossman: Yes; essentially I am asking him and I believe the reason for this will become clear from some questions that will follow.

By Mr. Grossman:

I just want to know did you open the door of the cab?

A. I could have.

Q. Did you see the defendant drop the object before or after the door of the cab was opened?

A. Before the door of the cab was opened.

Q. You are sure of that?

A. Yes, sir.

Q. I will show you—

[fol. 232] The Court: Is that the police report?

Mr. Grossman: Yes, your Honor.

The Court: What page?

Mr. Grossman: It is the police report, page No. 2, I believe it is.

The Court: All right.

By Mr. Grossman:

And I will call your attention to this passage particularly.

A. (No answer)

Q. Officer Beckmann, did you not make the following statement in the arrest report in this connection, in connection with the activities to which you are testifying, and I quote:

> "When Officer Beckmann identified himself to arrestee, arrestee reached inside of his jacket pocket extracting a white object. When the arrestee did this Officer Beckmann opened the cab door and observed arrestee drop the object to the floor by his feet."

Did you so state in your arrest report, Officer Beckmann?

A. Yes.

Q. Does that refresh your recollection as to the sequence of events?

A. No. The sequence of events, as I have testified to, are actually the events that happened.

[fol. 233] Miss Bulgrin: What?

The Witness: As I have testified previously to this, those are the sequence of events.

By Mr. Grossman:

In other words, the sequence of events are as you testified here and not as you stated in the arrest report?

A. Yes, primarily.

Q. Thank you. Do you recall when in the sequence of events at First and State streets you first drew your gun?

A. After I had pointed out the object to my partner, a policewoman, Policewoman Grace and while struggling with the defendant.

Q. In other words, Officer Beckmann, you didn't—you hadn't drawn your gun while the defendant was still in the cab?

A. No.

Q. You didn't draw your gun until after the defendant had alighted from the cab?

A. That is correct, sir.

Q. You hadn't drawn your gun until after you pointed out this object on the floor of the cab to Officer Grace?

A. That is correct.

Q. Did you have any object in either hand at the time the defendant alighted from the cab?

A. No, I don't think I did.

[fol. 234] Q. Did you make any attempt to retrieve the object from the floor of the cab, Officer Beckmann?

A. Yes.

Q. Would you describe for us the motion by which you attempted to do this?

A. I attempted to restrain the defendant with my left hand and I attempted to retrieve the object with my right hand. I was reaching into the open cab door to retrieve the object laying on the floor and also trying to hold onto the defendant at the same time.

Q. And where were you standing at that time in relation to the cab?

A. By the side of the cab on the right side.

Q. Right alongside the cab or just——

A. Right by the cab.

Q. Right flush up against the cab?

A. Right next to the cab—right by the open door.

Q. As close as you could be to the cab—I mean against or as close as you could be to the rear door of the cab, is that right, standing outside the cab?

A. I was standing outside the cab.

Q. But you were standing directly beside the rear door of the cab?

A. Yes, trying to reach into the cab and retrieve the object.

[fol. 235] Q. And where was the defendant standing?

A. He was struggling with me by the right side of the cab.

Q. I said where was the defendant standing—what was his position?

The Court: He said he wasn't standing; he said he was struggling.

By Mr. Grosmann:

What position was the defendant in geographically at that time? He occupied some position, I assume.

A. On the right side of the cab.

Q. And in relation to what side of you was the defendant on at the time—the right or left, in front of you or behind you?

A. Well, I was facing in all directions, sir. I was facing the defendant, which would be facing south at one time, west at one time and also trying to look into the cab which would place me facing north.

I was struggling with the defendant right there at that particular spot.

Q. You say when you faced the defendant you were facing south. In other words, you were between the defendant and the cab?

A. Yes.

The Court: All the time or at one time?

[fol. 236] The Witness: At one time.

By Mr. Grossman:

You were between the defendant and the cab at the time Officer Grace came around to the right side of the cab?

A. Yes.

Q. And when you pointed out this object to Officer Grace you were pointing, as it were, behind you, is that correct, when you were pointing at an object that was behind you or in front of you at that time?

A. I pointed at the object with my right hand which would be to the right of me.

The object—this is rather hard to explain sir. The object was laying on the floor of the cab. The cab door was open

on the right side. I was on the right side of the cab trying to hold the defendant with one hand. The defendant kept pulling away from me and I restrained him with one hand and also tried to reach into the cab to retrieve the object in the cab and my partner then, Officer Grace, came around and I pointed to the object.

Q. I beg your pardon?

A. When she came around to the cab on my side I told her to pick up the stuff—pick up the object.

Q. You did what—did you turn?

A. I turned, yes. I pointed at the object and when I pointed at the object I turned, I guess.

[fol. 237] Q. But you are not sure whether at the time you pointed at the object you were facing toward the cab?

A. Yes. I pointed it out like this and said: "Pick up the stuff."

Q. Where was the object—what part of the floor of the cab was the object on?

A. On the floor board in back of the front seat, near the right center, to the right of the center.

Q. To the right of the center?

A. Yes.

Q. Did you see Officer Grace pick up the object from the floor of the cab?

A. No, I didn't.

Q. Approximately what was the size of the object you referred to?

The Court: He identified it here yesterday. It is right here. You can show it to the jury.

By Mr. Grossman:

Q. Well, was it——

The Court: Where is it, Mr. Clerk?

The Clerk: Right here, your Honor.

(Object handed to the witness.)

The Court: Do you want him to give his estimate in inches? Here is a ruler. It has inches and centimeters on it.

By Mr. Grossman:

Q. Was the object approximately—is it now approxi-

[fol. 238] mately occuping the same amount of space and

I say this because it is a rubber container. Is it approximately the same size as when you observed it?

A. It is a little smaller.

Q. About how large was it at that time?

A. I don't know the exact measurements.

Q. Approximately? Would you say about six inches?

A. No, it wasn't that large. It was closer to five inches.

Q. Officer Beckmann, were you the complaining witness in this case—did you first call—well, are you able to answer that?

The Court: What do you mean by "the complaining witness"?

By Mr. Grossman:

Q. Are you the individual who first called this case to the attention of the Federal Court?

A. Yes.

Q. Now, after the defendant alighted from the cab you testified, I believe, he broke away from you and you followed him, is that correct?

A. Yes.

Q. Did you overtake the defendant in an alley running between State and Cummings?

A. Yes.

Q. Were you and the defendant alone in that alley?

A. Yes.

[fol. 239] Q. Did you shoot the defendant in that alley?

A. I shot at the defendant.

Q. Well, did you hit the defendant?

A. What I did was—I shot at the defendant. After I shot at the defendant I saw him stagger and I caught up with the defendant and he had blood on his shirt.

Q. Did you call an ambulance subsequent to that?

A. Shortly after I had subdued him I did.

Q. And you fired just one shot, is that correct?

A. Yes.

Q. And do you remember testifying that you did not know whether or not as a fact you shot the defendant?

A. I am testifying, sir, as best I can to this. I didn't try to prove that I had shot the defendant. All I am saying is that I shot at the defendant. I was the only one in the alley. There was only one shot fired and I saw the

defendant stumble shortly after I had shot at him. And when I caught up with him he had blood on his shirt.

Q. Isn't it a fact that you shot the defendant in the back, Officer Beckmann?

A. I shot at the defendant when he was running down the alley, yes.

The Court: Did you hail to him to stop?

The Witness: Yes, sir.

The Court: Several times?

[fol. 240] The Witness: Several times, yes, sir.

By Mr. Grossman:

Q. My question at this point is did you shoot the defendant in the back as opposed to the front leaving aside the circumstances under which you shot him?

A. When I shot at him the defendant was running away from me.

Q. I didn't ask you that. Did you shoot him in the back or front? Was he facing away from you or facing toward you?

A. When I shot at him he was facing away from me.

Q. So you shot him in the back. Now, isn't it a fact, Officer Beckmann, that you shot the defendant after he stopped with his back toward you and with his hands raised in the air?

A. No.

Q. That is not a fact?

A. No, sir.

Q. Perhaps I can refresh your recollection. I am referring to page 18, line 16 to page 19, line 3.

The Court: I want to see that. What happened to our file?

Miss Bulgrin: I think Mr. Grossman had it.

The Court: Let me se what you have there.

Mr. Grossman: It is a photostatic copy.

The Court: Now, your last question was:

[fol. 241] "Isn't it a fact that the defendant had stopped and had his hands in the air and was facing away from this witness and you shot him?"

Mr. Grossman: That was the question I addressed to the witness.

The Court: That is what you are going to impeach him on? Is that what you propose to do?

Mr. Grossman: I will show him this page and I plan to ask one other question.

The Court: I mean is that the purpose of this?

Mr. Grossman: This is to—insofar as he testified that the defendant was running at the time and I asked him "Was the defendant stopped," or I can ask him that phase of it alone. If you prefer I will ask him simply: "Did the defendant stop" and then show him that.

The Court: Will you answer my question, counsel. I am asking you whether or not you are offering this for the purpose of impeaching him concerning his last answer?

Mr. Grossman: Yes.

The Court: It is not contradictory and it is not proper impeachment.

Mr. Grossman: Then I will ask another question.

By Mr. Grossman:

Q. Officer Beckmann, isn't it a fact that you stopped—that you shot the defendant after he stopped?

[fol. 242] A. When I shot at the defendant he was running.

Mr. Grossman: Again, your Honor, I offer that as an inconsistent statement. I think that it is rather clearly inconsistent with that phase of his testimony and I think certainly, at least, the jury should be permitted to hear that phase of it.

The Court: You can ask him the question.

Mr. Grossman: Very well.

Miss Bulgrin: What page is this?

Mr. Grossman: Page 18 and page 19.

By Mr. Grossman:

Q. Did you not testify under oath as follows on March 12—and I am quoting the questions and answers—did you not give the following answers to these questions—I am going back just one line.

"Q. That is when you shot him?

"A. I stopped him in the alley.

"Q. You stopped him in the alley?
"A. Yes.
"Q. And that is when you shot him, is that right?
"A. That is when I shot at him.
"Q. Shot at him? How many shots did you fire altogether?
"A. One shot."

The Court: Is that all?
Mr. Grossman: For the moment, your Honor.

[fol. 243] The Court: Now, counsel, that is not fair cross examination because a few answers later he gives the same testimony that he gave on this stand and the answer:

"A. One shot.
"Q. Well, there is some doubt in your mind then as to whether or not you shot the defendant, is that correct, Officer?
"A. No.
"Q. No doubt in your mind at all. All right, we have got that cleared up. Now on direct examination you testified that this defendant broke away from you several times. You have told us about once when he broke away at the cab. Now, will you tell us when he broke away from you on the other occasions?
"A. When I caught up with him in the alley and observed that he was bleeding.
"Q. That was after you shot him?
"A. That is after I shot at him."

Miss Bulgrim: Is that on page 11?
The Court: That is on page 19, counsel.
Mr. Grossman: May I state to the court I was simply—at this point I am simply attempting to have the witness—I am simply attempting to show the inconsistency in the witness's statement as to whether the defendant was running at the time.
The Court: Counsel, you cannot pick one sentence out of context in a deposition and especially when it is immediately cleared up by the man who is on cross examination.
[fol. 244] Mr. Grossman: If I may say so to the court, I believe his later statement as to the later breaking away after he caught up with the defendant, a shot was fired,

he was bleeding. That is a subsequent matter which I intended to examine him on subsequently, but at this time I am only concerned with whether the defendant was stopped at the time of the shot. I was then going to proceed into what happened after.

The testimony which the court just read relates to the circumstances that happened after he ran the second time, which is something else—that is another matter that I was going to get into, if the court please, but he did not testify at any time in his prior testimony——

The Court: He testified when he caught up with him in the alley and that is when he caught up with him.

Mr. Grossman: I think the jury will draw the proper inferences.

The Court: Well, the court has some obligations, too.

Mr. Grossman: I understand, I understand. I would now like to get into another phase of it.

The Court: The court has obligation to see that you don't waste the court's time and the jury's time and everybody's time with a lot of triviality in attempting to build up inconsistencies where they do not exist.

Mr. Grossman: For the record may I——

The Court: On page 11:

[fol. 245] "Officer, you say you did not know whether you shot at him?

"A. I shot at him.

"Q. And he was standing about a foot in front of you with his back toward you and his hands in the air at the time, is that right?

"A. Of course not."

Mr. Grossman: That is what he testified to not three minutes before he testified to what you read. I think the fact he made inconsistent statements even at a prior time——

The Court: If he did make inconsistent statements, counsel, and in my judgment they are not at all inconsistent. You pick one isolated question and answer and that doesn't prove inconsistency.

Mr. Grossman: For the record may an objection be noted to the comments of the court in the presence of the jury as to the last colloquy.

The Court: It is already noted. The record speaks for itself.

[fol. 246] By Mr. Grossman:

Q. Very well. Officer Beckmann, after you shot the defendant or shot at the defendant and noticed he was bleeding did you subsequently strike at the defendant with your sap?

A. After I caught up with the defendant I observed he was bleeding. At that time I tried to take him into physical custody and at that time he started screaming, "Kill me, go ahead and kill me."

Q. This was after you shot him that he—after you shot him he screamed?

A. After I shot him, sir, and when I caught up with him he turned and struggled and attempted to kick me between the legs.

Q. He did not——

The Court: You then did what?

The Witness: I then put my gun in my holster and grabbed with him. He tried to get away from me and while he was doing this he was still screaming, "Kill me, go ahead and kill me. I want you to kill me," and also trying to kick me.

I then took my sap out of my left pocket, my left rear pocket and attempted to subdue him with my sap.

By Mr. Goldman:

Q. By a "sap"—that is what is commonly known as a blackjack, is that right, Officer?

A. Yes.

Q. Did he actually kick you as opposed to kicking at [fol. 247] you?

A. I know he didn't kick me between the legs. He may have kicked me in the leg but I would have recalled whether he kicked me between the legs.

Q. And you struck at him several times subsequently with your sap or blackjack following this?

A. Shortly after the attempted kicking and my attempt to restrain him.

Q. And his attempt to kick you was actually after you had shot him, isn't that correct?

A. Yes.

Mr. Grossman: I have one further line of—one further question actually, which will be preliminary to matters which I think——

The Court: Go ahead and ask the question.

By Mr. Grossman:

Q. Did you testify before the grand jury in this case, Officer Beckmann?

A. No, sir.

Mr. Grossman: That concludes our cross examination.

The Court: Any redirect examination?

Miss Bulgrin: A couple of questions, your Honor.

Redirect examination.

By Miss Bulgrin:

Q. Is a "sap" standard police equipment, Mr. Beckmann?

A. Yes.

[fol. 248] Q. Approximately how long do you estimate the events at the taxicab took place—over what period of time that covered?

A. Right at the taxicab?

Q. Yes, from the time you identified yourself until you starting chasing the defendant down the street.

A. Oh, probably less than a minute.

Q. With respect to Exhibit 1-A which is the rubber container filled with powder, did you turn that over to the clerk of the court, Mr. Beckmann?

A. I booked it at our central property office in a sealed envelope.

Q. And where does it go from there?

A. From there it is taken to the criminal lab where Officer Carter testified previously he received it in a sealed condition.

Miss Bulgrin: That is all, your Honor.

The Court: In connection with your experience in narcotic work have you become familiar with the amount in grains or grams that is ordinarily used by an addict in what they call a "fix" or "pop"?

The Witness: Yes.

The Court: How much is it?

The Witness: It depends on the addict's tolerance. It depends on the addict. One addict will say that he shoots [fol. 249] approximately a gram or a gram and a half a day and the next one——

The Court: How many grains is that?

Mr. Grossman: If the court please, and for the reord, may I object to this. There is no evidence whatever as to, or any charge or evidence as to any problem of addiction or use of narcotics.

The Court: Well, this goes to the quantity of narcotics that this defendant had. He had possession of it and the presumption is that he had unlawful possession and the duty is cast upon him to explain it. I think my line of inquiry is material.

Miss Bulgrin: Your Honor, I might say for the record that the question of possession—with reference to that question the jury might be instructed that that is a question for the jury to determine.

The Court: Of course the question of possession is one for the jury.

Miss Bulgrin: Thank you, your Honor. Would you so instruct the jury?

The Court: At the appropriate time I will instruct the jury on everything.

How many grains are there in a gram? In other words, these two ounces or whatever is contained, according to the chemist yesterday about 1,019 grains, how many fixes or [fol. 250] pops would that be?

The Witness: Well, it would depend on the strength of the narcotic.

The Court: The chemist didn't testify as to the strength. He testified it was heroin, but he did not testify as to the purity of it. Is a grain a "pop"?

The Witness: Yes, one to two grains.

The Court: One to two grains?

The Witness: Yes.

The Court: And they are usually sold retail in capsules?

The Witness: Capsules or paper bindles.

The Court: All right. No other questions?

Miss Bulgrin: Nothing further.

Mr. Grossman: No questions.

The Court: Step down. Call your next witness.

Miss Bulgrin: Mr. Clerk, are all Government's exhibits in evidence?

The Clerk: Yes.

Miss Bulgrin: Then the Government rests.

Mr. Grossman: May we approach the bench at this time, your Honor?

The Court: Yes.

(The following proceedings were had at the bench and without the hearing of the jury:)

Mr. Grossman: At this time, if your Honor please, I wish [fol. 251] to make a motion for an acquittal and I think it should be made out of the presence and hearing of the jury.

The Court: Yes, it should be and it is being so made. Go ahead. What are your grounds?

Mr. Grossman: On the grounds first, that the evidence is insufficient to support a verdict of guilty in this case. On the ground that the evidence is insufficient to go to the jury and the evidence is insufficient to sustain a verdict of conviction of the defendant on the offense with which he is charged and, secondly, in order to assure preservation of our point I am renewing the grounds asserted in the previous motions—motions made prior to the trial of the case.

The Court: On the ground the evidence was unlawfully seized?

Mr. Grossman. On the ground of the ruling in the state court.

The Court: Very well, the motions will be denied. Do you want to make an opening statement now?

Mr. Grossman: Yes, if your Honor please.

The Court: Or do you want to have a short recess and think about it?

Mr. Grossman: I would like to have a short recess.

The Court: All right.

(The following proceedings were had in the presence and hearing of the jury:)

[fol. 252] The Court: We will take a short recess at this time, ladies and gentlemen. You will go to your jury room and you will remember the admonition heretofore given.

And during the recess will you give me the proposed instructions?

Miss Bulgrin: Yes, your Honor.

(Short recess)

Miss Bulgrin: I will hand the court an original and a copy of our requested instructions as well as a copy to Mr. Grossman.

The Court: The record will now show that in addition to the defendant being present with his counsel, the United States Attorney is present and the jury is present and each one in his or her place.

Do you desire to make an opening statement?

Mr. Grossman: No, your Honor.

May the record show first that the arrest report previously furnished pursuant to court order by Government counsel to counsel for the defendant, is being returned to counsel for the Government in the condition in which the defense counsel received it.

And may the record also show that a copy of the instructions requested by the defendant are being served on counsel for the Government and the original and one copy being furnished to the court.

[fols. 253-321] At this time, if your Honor please, the defense rests its case.

The Court: Very well.

[fols. 322-326] Los Angeles, California; Thursday, July 25, 1957; 11:00 A. M.

(The jury returned to the courtroom at 11:00 o'clock a. m.)

VERDICT

The Court: In Case No. 26019, United States v. Jose Terrones Rios, the record will show that the defendant is present in person and by counsel, and that the jury is present and each one in his or her place.

Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Mr. Foreman, hand it to the bailiff, please.

The clerk will read the verdict.

The Clerk: "United States District Court, Southern District of California, Central Division at Los Angeles.

"United States v. Jose Terrones Rios; No. 26019, Criminal.

"We, the jury in the above-entitled cause agree and find the defendant guilty as charged in the indictment.

"Dated: July 25, 1957.

"Murray A. Wolfe, Foreman."

[fol. 327] Los Angeles, California; Monday, August 12, 1957; 2:00 P. M.

(Other court matters.)

The Clerk: Case No. 26019, United States v. Jose Terrones Rios.

The Court: This matter is on today for sentence after conviction by jury in this court and after reference to the probation department for presentence investigation and report.

Mr. Grossman, have you read the report?

Mr. Grossman: Yes, I have, your Honor.

The Court: Do you have any comment to make?

Mr. Grossman: Well, I would like to point out to the court, first, that while this statute in question also embraces sale as well as possession, that this is the only offense charged here and the conviction was tagged on the basis of the possession, which I think is one factor to be taken into consideration.

I believe that the report goes into detail as to the family status, past employment, and so forth.

The Court: Well, there were 2 ounces and 60 grains of heroin involved. Assuming that they take a grain to a pop, that is about a thousand pops, or fixes, which is quite a bit of heroin for anybody to be carrying around, especially if they are just users.

Mr. Grossman: I might say, your Honor, I believe that [fol. 328] that quantity is a factor which the Government

takes into account in putting this under the statute, for which the minimum itself, let alone the maximum, is quite severe. I believe that is one basis for the Government in bringing it under this statute, which at its best is a very severe statute.

I am not arguing with the statute, I am simply saying that that factor probably was an important one in putting it under the more severe statute with this high minimum sentence. I have been so advised, in fact, by the Government.

The Court: The record shows that he just did not get his fingers burned once before he got caught this time, but he has six convictions in the State court for previous narcotics offenses.

Mr. Grossman: I believe those are all based or all involve use. I think that was the gravamen on most of these offenses, that it was essentially addiction and possession.

I think that perhaps hospital care or something might be more helpful in this case than a long prison sentence.

The Court: I cannot see anything at all about this case here where there are any circumstances which compel me to alleviate the penalty. There have been six previous convictions of narcotics, and he had in his possession in this case 2 ounces and 60 grains. Then there is the matter of flight, the officer had to shoot him to stop him, and finally after wounding him he had to subdue him with his [fol. 329] billy. I am not impressed with any extenuating circumstances in this case.

Do you have anything to say, Mr. Rios?

The Defendant: No, sir.

The Court: Do you, Mr. Johnson?

Mr. Johnson: No. Your Honor heard the evidence in the case and is probably more familiar with it than I am.

The Court: Is there any legal reason why sentence at this time should not be imposed?

Mr. Grossman: No, your Honor.

Judgment and Sentence

The Court: It is the judgment and sentence of the court that the defendant be committed to the custody of the At-

torney General for a period of 20 years. The defendant will stand committed.

[fol. 330] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 331] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Argument and Submission—February 5, 1958 (omitted in printing).

[fol. 332] United States Court of Appeals for the Ninth Circuit

Before: Pope, Fee and Hamley, Circuit Judges.

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—May 26, 1958

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 333] In United States Court of Appeals for the Ninth Circuit

No. 15,723

Jose Terrones Rios, Appellant,

vs.

United States of America, Appellee.

Upon Appeal from the United States District Court for the Southern District of California Central Division

Opinion—May 26, 1958

Before: Pope, Fee, and Hamley, Circuit Judges

Hamley, Circuit Judge:

Jose Terrones Rios appeals from his conviction for violating § 2 of the Narcotic Drugs Import and Export Act, as amended, 21 U.S.C.A. § 174.

Rios contends that it was error to receive in evidence a package of narcotics which had been seized by city police, where a state court had suppressed the same evidence, and acquitted, in a prosecution involving the identical incident.

The facts essential to a consideration of this contention are as follows: Los Angeles police officers, watching for possible illegal narcotics activity in a problem-area of the city, took under surveillance a taxicab which was parked in a lot next to an apartment house. They observed Rios approach the taxicab, look furtively about, and enter. As the vehicle drove away, the police officers followed in an unmarked police car. The time was 11:00 p.m.

When the taxicab stopped at a traffic signal, the two officers alighted from their car and approached. They had no warrant for Rios' arrest, had not seen him commit any crime, and had no idea as to his identity. One officer came [fol. 334] to the side of the taxicab where Rios was seated, and orally identified himself as a police officer. He exhibited his badge and shined his flashlight upon it. He then observed that Rios reached into his pocket and dropped an object on the floor of the taxicab.

Focusing his light upon the object, the officer saw that it was a transparent rubber contraceptive apparently filled with a light colored powder. The officer knew that it was a common practice for dealers in narcotics to use this means of carrying heroin.

Immediately thereafter, Rios pushed the right door out as the officer simultaneously pulled it out. Rios alighted. The officer grasped Rios' arm, telling him he was under arrest "for narcotics." The other officer retrieved the package from the floor of the taxicab. It was later found to contain heroin. Rios struggled free from the officer, but was later recaptured.

Charged in the California Superior Court with illegal possession of narcotics, contrary to California Health and Safety Code, § 11500, Rios was accorded a preliminary hearing. A trial was thereafter had in state court. The only evidence received was the reporter's transcript of the preliminary hearing. A motion to suppress the evidence, consisting of the package of heroin, was made and granted. The court held that the police officers did not have probable cause for arresting Rios without a warrant of arrest, and

that seizure of the evidence without a search warrant was therefore unlawful. Rios was then acquitted.

The police officer who had arrested Rios, after conferring with his superiors, went to the federal narcotics office. As a result, an indictment was returned by a federal grand jury, charging Rios with a violation of 21 U.S.C.A., § 174, referred to above. This charge related to the same incident and narcotics involved in his state prosecution.

Rios moved in the federal district court to quash the indictment on the ground that it had been obtained solely on the same evidence which had been suppressed by the state court. In the alternative, and for the same reason, he moved to suppress this evidence.

At a pretrial hearing on these motions, Rios offered a transcript of the state court hearing in which the evidence was ordered suppressed. On the basis of this showing, he [fol. 335] urged that one or other of his motions be granted. The district court declined to grant either of the motions on this showing, and stated that it would receive further evidence. Rios then introduced a transcript of the state court preliminary hearing in which the facts which led to the state court ruling were developed. The government called the two police officers to give further testimony, and they were cross-examined.

The district court then held (1) that it was not bound by the state court determination that the evidence had been illegally seized; (2) that the seizure was legal because made incident to a lawful arest; and (3) that there was no federal participation in the arrest and seizure. The motions were accordingly denied and the narcotics were later received in evidence.

It will be observed that the denial of these motions rests upon two grounds: (1) That the evidence was legally seized; and (2) that, if it was illegally seized, it is nevertheless admissible because federal authorities did not participate in the seizure.

Concerning the first of these grounds, Rios does not argue that the evidence submitted to the federal court fails to support the finding and conclusion that the evidence was legally seized. He contends only that the state court determination that the evidence was illegally seized is binding

upon the federal court and precluded such court from making an independent determination.

We do not agree. A state court prosecution and acquittal does not preclude subsequent federal prosecution and conviction of the same person on a similar federal charge. Serio v. United States (5 Cir.), 203 F.2d 576.[1] This being so, we perceive no reason why any state court ruling which leads to an acquittal in that court is binding on the federal court in a later federal prosecution.

It is true that here the state court ruling which led to acquittal pertains to a basic right—the right to be secure in person and property—which right is enforceable against both federal and nonfederal authorities.[2] It is also true [fol. 336] that the state court ruling represents an application of a method of enforcing this right—exclusion of illegally-seized evidence in a subsequent criminal trial—which both the federal government and California utilize.[3]

But the federal trial court did not here contest that constitutional principle or deny to California the right to apply, in its own way and in its own proceedings, the mutually-followed remedy. That is all California sought to do in this case—and it succeeded—by excluding the evidence and acquitting Rios of the state charge. California has not sought to exclude that evidence from use in a federal criminal proceeding.[4]

The federal court has, it is true, differed from the state court as to the findings and conclusions to be drawn from

---

[1] This is an application of the rule announced in United States v. Lanza, 260 U.S. 377. See, also, Jerome v. United States, 318 U. S. 101; 16 A.L.R. 1231, 22 A.L.R. 1551, 48 A.L.R. 1106, annotations

[2] Wolf v Colorado, 338 U. S. 25.

[3] Weeks v. United States, 232 U. S. 383; People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

[4] The United States excludes from use in state court criminal proceedings, evidence seized by federal authorities under a void search warrant. Rea v. United States, 350 U.S. 214. Whether California could adopt a similar enforcement technique, we need not now decide. It did not do so in this case.

the evidence pertaining to the method of seizure.[5] No presently-recognized principle of constitutional law, evidence, comity, or res judicata[6] prevented it from doing so. If a wholly novel doctrine is to be fashioned to tie the hands of the federal courts in this regard, it ought not to be done by an intermediate appellate court.

We therefore hold that the federal trial court was entitled to make its own determination as to the legality of the seizure, and that its uncontested finding and conclusion that the seizure was legal warranted denial of the motions in question.

We reach the same result upon consideration of the second ground relied upon by the trial court in denying these motions.

Where it is conceded by the parties, or determined by the federal trial court, that incriminating evidence was illegally [fol. 337] seized, it may nevertheless be received in a federal prosecution, if the seizure was made without the participation of federal officials.[7] This is true even though the state wherein the evidence was seized, as in the case of Cali-

---

[5] Actually, the federal court findings and conclusions were based upon a more extensive showing than was presented in the state court. We do not know what the state court ruling would have been on the amplified record.

[6] The application of res judicata in such circumstances has been specifically denied. Serio v. United States (5 Cir.), 203 F.2d 576, 578.

[7] Lustig v. United States, 338 U. S. 74, 78: " . . . It is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter . . . ."; Byars v. United States, 273 U. S. 28, 33; Center v. United States, 267 U. S. 575, per curiam, as explained in Gambino v. United States, 275 U. S. 310, 317; Weeks v. United States, 232 U. S. 383, 398. This court has long applied the "silver platter" doctrine. See Anderson v. United States (9 Cir.), 237 F.2d 118; Parker v. United States (9 Cir.), 183 F.2d 268; Symons v. United States (9 Cir.), 178 F.2d 615; Hall v. United States (9 Cir.), 48 F.2d 66.

fornia, has a state exclusionary rule similar to the federal court exclusionary rule announced in Weeks, supra.[8]

We see no reason why the same rule should not be applied where the determination that the evidence was illegally seized by state or local authorities is made by a state trial court. The "silver platter" doctrine operates on the assumption that the illegality of the state seizure has been established. How it has been established is immaterial.

Hence, even if it be assumed that the federal trial court was bound by the findings and conclusions of the state court, to the effect that the seizure was illegal, the evidence was still admissible in the federal proceedings upon application of the "silver platter" doctrine. The only escape from this conclusion is to say that the doctrine to which reference has been made is not to be applied where there has been a state court determination that the evidence was illegally obtained. We find no authority for such an exception to the doctrine.

[fol. 338] We therefore hold that the trial court did not err in receiving in evidence the package of narcotics seized by city police.

Rios also contends that the trial court erred in restricting his right to examine statements given to federal authorities by the two police officers who testified for the government. In presenting this argument, appellant relies upon the decision in Jencks v. United States, 353 U.S. 657.

Under this heading, it is argued, first, that while the written statements signed by these witnesses were produced

---

[8] For example: Washington had such an exclusionary rule (State v. Buckley, 145 Wash. 87, 258 Pac. 1030) at the time we applied the "silver platter" doctrine with regard to evidence illegally seized by state authorities in that state. Parker v. United States, supra. Likewise, state rules of exclusion were in effect in Missouri (State v. Owens, 302 Mo. 348, 259 S. W. 100) and Indiana (Flum v. State, 193 Ind. 585, 141 N. E. 353) at the time the federal courts applied the "silver platter" rule with regard to exhibits seized by state authorities in those jurisdictions. See Jones v. United States (8 Cir.), 217 F.2d 381; United States v. Stirsman (7 Cir.), 212 F.2d 900.

for inspection, the court erred in excluding reports or records, prepared by federal agents, of oral statements made by the witnesses, where such reports or records were not in the words of the witnesses.

The record on appeal fails to show that there were any reports or records prepared by federal agents on the basis of oral statements made by the witnesses in question. Nor did counsel for appellant ask for any reports or records except such as were substantially in the words of the witnesses. Moreover, counsel for appellant did not, during the trial, object to the limitation which the court placed upon the reports and records to be supplied.[9]

---

[9] During a pretrial hearing on certain motions, at which the two police officers testified, and while Officer Beckman was under cross-examination, counsel for Rios moved that "any transcript of any statement, oral or written, made by this witness to the federal agency—and particularly the statement just referred to—be made available by the government for inspection of the defendant," for assistance in preparing for cross-examination. Counsel for Rios then clarified this request by stating that, in asking for a "transcript," he was "referring to a transcript which purportedly set forth all of the testimony, or substantially all of the testimony of the witness, and not mere notes. . . . Substantially the witness' words."

Later during the same hearing, while Officer Grace was under cross-examination, counsel for Rios requested that "in so far as the government has any written record of the statements of this witness as setting forth the substance of her statement as opposed to mere notes taken as to the government's position in connection with her remarks, that these be produced for inspection along the lines indicated previously by Your Honor."

During a recess in the trial, and while Officer Grace was on the stand, counsel for Rios moved "that any statement of this witness to any officer or agent of the federal government be produced for examination." The witness then stated, in response to questions from the bench, that she had not made any statement in writing to any officer of the federal government, other than a police report which she had

[fol. 339] In view of these circumstances, the court ruling was not prejudicial, and, even if it were, counsel for appellant did not make and preserve a record upon which the ruling can now be examined. Whether the ruling was correct, we need not decide.[10]

Rios also argues, however, that with regard to the written statement of the witnesses, which was produced for examination, the trial court improperly exercised the right to determine the materiality and relevancy thereof. Here, too, Jencks is relied upon to support the contention.

During the pretrial hearing, counsel for the government produced a written arrest report, consisting of four sheets, prepared by Officers Beckman and Grace. Before permitting counsel for appellant to inspect this report, the court folded over, and stapled, a part thereof. The part thus excised was apparently a summary, by Beckman and Grace, of a statement which the taxicab driver had made to them. The taxicab driver was not called as a witness during this pretrial hearing.[11] Counsel for Rios voiced no objection to this procedure.

prepared in collaboration with Officer Beckman. The court ordered that this be supplied for inspection by counsel for Rios, and this was done.

Counsel at no time objected to the ruling of the court limiting the reports and records to be supplied.

[10] If this case were to be remanded for a new trial, the procedure would be governed by the recent enactment of 71 Stat. 595, adding new § 3500 to title 18, United States Code. United States v. Miller (2 Cir.), 248 F.2d 163, 165. Paragraph (e) of the new section defines the term "statement" in a manner consistent with the ruling of the trial court in this case. See, also, the legislative history of 71 Stat. 595, 2 U. S. Code Congressional and Administrative News (1957), 1861-1870.

[11] In taking this action, the court said: "The government has not and is not apparently at this moment relying on the other witness, and may not, and under my conception of the Jencks case you are not entitled to see anything relating to that other witness until the government decides to rely upon his testimony."

During the trial, the same procedure was followed. On that occasion, counsel for Rios observed that the taxicab driver had already testified in the trial. Government counsel responded by stating that the references in the arrest report were not the statements of the taxicab driver. Other [fol. 340] than the indicated remark concerning the taxicab driver, counsel for Rios did not object to this action taken during the trial.

The fact that counsel for appellant did not voice specific objection to the procedure followed would be enough to dispose of the point now under discussion.[12] The record further indicates, however, that, neither during the time the taxicab driver was on the witness stand, nor thereafter, did counsel for Rios indicate any desire to inspect any pretrial statement made by that witness, for the purpose of preparing impeachment cross-examination.

That witness had completed his testimony and, for all we know, had gone on his way. It was then too late, except upon showing an adequate excuse, to begin preparing for his cross-examination. In any event, no such request was made.

On this state of the record, and without reaching the merits, we hold that the judgment may not be reversed because of the action of the trial court in excising a portion of the arrest report.[13]

Finally, Rios contends that the trial court erred in refusing his request to examine the statements made by Officers Beckman and Grace before the grand jury.

The two officers did not testify before the grand jury. The argument therefore assumes a fact which is nonexistent. We do not reach the question of whether state-

---

[12] Were we to assume that this trial court action was erroneous, we could not determine whether it was prejudicial, in view of the fact that the arrest report, with excised portion indicated, is not before us on this appeal. See United States v. Miller, supra, 165.

[13] There is some contention that the trial court unduly restricted the cross-examination relative to this arrest report. We do not agree.

ments made before the grand jury must be produced for inspection by a defendant.

Affirmed.

[File endorsement omitted.]

[fol. 341] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15723

JOSE TERRONES RIOS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed and Entered May 26, 1958

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 342] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 343] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 40 Misc.

JOSE TERRONES RIOS, Petitioner,

vs.

UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —April 20, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

The case is transferred to the appellate docket as No. 854.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. April 20, 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 810250 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 26 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California
Counsel for Petitioner

Of Counsel:
HARVEY M. GROSSMAN

INDEX

SUBJECT INDEX

	Page
BRIEF FOR THE PETITIONER	
Opinion Below	1
Grounds of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement of the Case	2
A. Arrest, Search and Seizure	2
B. State Court Proceedings	9
C. Federal Court Proceedings	10
Summary of Argument	14
Argument	15
I. The Evidence Upon Which Petitioner Was Convicted Was Obtained in Violation of His Constitutional Rights	15
A. The Evidence Upon Which Petitioner Was Convicted, Having Been Obtained by State Police in Violation of State Law, Was Indelibly Tainted and Should Not Be Admitted in a Federal Court	15
B. The Search and Seizure of the Evidence in Question Was in Clear Violation of the Constitutional Standards Established by This Court	16
C. The Search and Seizure in the Instant Case May Not Be Justified as Incident to a Lawful Arrest	28
1. In determining the lawfulness of an arrest without warrant, the courts will look to state law insofar as that law comports with federal constitutional standards	28

Page

2. The search and seizure in the instant case were not incident to any lawful arrest under California law 28

II. The Mere Fact That the Unlawful Search and Seizure in the Present Case Was Conducted by State Officers Does Not Preclude Application of the Exclusionary Rule 39

Preliminary Statement 39

A. The "Silver Platter" Doctrine Has Not Been Adopted by This Court 39

B. The "Silver Platter" Doctrine Has Been Rejected by the Better Reasoned Cases in the State Courts 40

C. Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in *Wolf* v. *Colorado* 46

D. Application of the "Silver Platter" Doctrine to Evidence Unlawfully Seized by State Officers in an "Exclusionary Rule" State Would Undermine the Effectiveness of That State's Exclusionary Rule, Contrary to the Common Federal-State Policy 52

E. The "Silver Platter" Doctrine Would Be Unworkable 55

Conclusion 56

Appendix A. Value and Importance of the Exclusionary Rule 57

Appendix B. Background and Effect of the California Exclusionary Rule 74

1. Circumstances Leading to California's Adoption of the Exclusionary Rule 74

2. Effect of the California Exclusionary Rule 80

Appendix C. Constitutional and Statutory Provisions 83

Table of Authorities Cited

Page

Cases:

Badillo v. *Superior Court*, 26 Cal. 2d 269, 294 P. 2d 23 (1956) 34
Benanti v. *United States*, 355 U.S. 96 (1957) 40, 54
Brinegar v. *United States*, 338 U.S. 160 (1949) 17, 19, 20, 27
Byars v. *United States*, 273 U.S. 28 (1950) 39
Carroll v. *United States*, 267 U.S. 132 (1925) 17
Costello v. *United States*, 255 F.2d 389 (C.A. 8, 1958) 40
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 28
Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940) 28
Gascon v. *Superior Court*, 169 A.C.A. 367, 337 P.2d 201 (1959) 34
Hanna v. *United States*, 260 F.2d 723 (D.C. 1958) 40, 48
Johnson v. *United States*, 333 U.S. 10 (1948) 17, 22, 28
Jones v. *United States*, 217 F.2d 381 (C.A. 8, 1954) 52
Little v. *State*, 171 Miss. 848 (1924) 41, 44
Lustig v. *United States*, 338 U.S. 74 (1949) 40
Nueslein v. *District of Columbia*, 115 F.2d 690 (1940) 72
Olmstead v. *United States*, 277 U.S. 438 (1928) .. 15, 16
Parker v. *United States*, 183 F.2d 268 (C.A. 9, 1950) 52
People v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) 36
People v. *Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955) 30
People v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) 68, 74
People v. *Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956) 31, 33
People v. *Goodo*, 147 Cal. App. 2d 7, 304 P.2d 776 (1956) 31
People v. *Harris*, 146 Cal. App. 2d 142, 304 P.2d 178 (1956) 31, 32
People v. *Harvey*, 142 Cal. App. 2d 728, 299 P.2d 310 (1956) 36

Page

People v. *Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894) 31
People v. *Martin*, 46 Cal. 2d 106, 294 P.2d 52 (1956) 36
People v. *Rodriguez*, 140 Cal. App. 2d 865, 296 P.2d 38 (1956) 36
People v. *Sanders*, 46 Cal. 2d 247, 294 P.2d 10 (1956) 31, 34
People v. *Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955) 31, 32
Ramirez v. *State*, 123 Tex. Crim. 254, 58 S.W.2d 829 (1933) 41
Rea v. *United States*, 350 U.S. 214 (1956) 57
Rios v. *United States*, 256 F.2d 173 (C.A. 9, 1958) 40
Serio v. *United States*, 203 F.2d 576 (C.A. 5, 1953) 40
State v. *Arregui*, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463 (1927) 41, 44
State ex rel. Kuhr v. *District Court*, 82 Mont. 515, 268 Pac. 501 (1928) 41
State v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2 (1930) 41
State v. *Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924) 41, 42
United States v. *Di Re*, 332 U.S. 581 (1948) 17, 21, 28
United States v. *Irvin*, 86 F.Supp. 362 (W.D. Ark. 1949) 25
United States v. *Stirsman*, 212 F.2d 900 (C.A. 7, 1954) 52
Walters v. *Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923) 41, 44
Weeks v. *United States*, 232 U.S. 383 (1914) 39
Wirin v. *Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948) 31, 34
Wolf v. *Colorado*, 338 U.S. 25 (1949) 46, 63

STATUTES:

United States Constitution 83
21 U.S.C. Section 174 83
California Health and Safety Code, Section 11500 84
Penal Code, Section 836 29

Page

MISCELLANEOUS:

50 A.L.R. 2d 531 47
Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on *People* v. *Cahan*, 43 Cal. L. Rev. 565 (1955) 78
Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities, 51 Col. L. Rev. 128 (1951) 47
Judson A. Parsons, Jr., State-Federal Crossfire in Search and Seizure and Self Incrimination, 42 Corn. L.Q. 346, 348 (1957) 41, 53
Osmond K. Fraenkel, Recent Developments in the Federal Law of Searches and Seizures, 33 Ia. L. Rev. 565 (1955) 62
Monrad G. Paulsen, Safeguards in the Law of Search and Seizure, 52 N.W. L. Rev. 65 (1957) 60
9 Stanford L. Rev. 538 80
Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144 (1948) 57

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 166-175)[1] was filed May 26, 1958, and is reported at 256 F. 2d 173.

Grounds of Jurisdiction

The Judgment of the Court of Appeals for the Ninth Circuit, affirming the Judgment below, was filed and entered May 26, 1958, and the Petition for Certiorari herein

---

[1] The Record will be indicated by the letter "R" followed by appropriate page numbers. Petitioner will sometimes herein be designated as defendant.

was filed on June 14, 1958. Jurisdiction of this Court upon certiorari is based upon 28 *U.S.C.*, § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are:

United States Constitution, Fourth, Fifth, and Fourteenth Amendments, 21 *U.S.C.*, Section 174; *California Health and Safety Code*, Section 11500.

Each of the foregoing provisions is set forth in Appendix C to this Brief.

Questions Presented

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

Statement of the Case

A. Arrest, Search and Seizure.

On February 18, 1957, plainclothes (R. 56-57) officers D. W. Beckman and Beverly P. Grace, assigned to the Juvenile Division of the Los Angeles Police Department, saw defendant enter a taxicab in the vicinity of First and Flower Streets in the City of Los Angeles, California (R. 6-8) at approximately 10 p.m. They followed the cab

in an unmarked car (R. 56) for some two miles (R. 6-8), though they had not seen defendant commit any offense and were not searching for a participant in any known crime. In fact, they had no idea at all as to the identity of the defendant, and no information whatever concerning the defendant, the cab driver, or the cab.[2] They subsequently pulled up behind the cab (R. 13) when it stopped at a signal[3] to see if they would be able to find any narcotics in defendant's possession[4] (R. 65).

---

[2] Officer Beckman testified as follows (R. 14-15):

"Q. You had no prior information concerning this defendant or the cab driver prior to stopping the cab?

"A. That's right, sir.

"Q. You had no prior information, confidential informant or otherwise, as to narcotics?

"A. As to the defendant or the cab?

"Q. Yes.

"A. That's right.

"Q. You had never seen this defendant before, had you?

"A. No sir."

Beckman further testified that of twenty-two narcotic arrests he had made preceding the arrest of the defendant, only one had been made of an occupant of a yellow cab, this being some three months prior to the arrest in question (R. 12).

[3] The cab was in the double lane next to the center line of the highway (R. 13).

[4] Beckman's testimony in this regard was as follows (R. 65):

"Q. Well, in stopping behind the cab and then approaching the cab, as you have related, is it not a fact your intention was to see if you could locate any, what I think you referred to as, stuff or narcotics in the possession of the defendant? Was that not your purpose at that time? That is, you testified you were investigating narcotics, and the question I am asking you is, was not your purpose in following the cab, stopping behind it and approaching the cab, to see if you would be able to uncover any narcotics in the possession of the defendant? Was that not your object?

"A. Yes.

"Q. And that was not your object prior to the time you testified that you saw anything on the floor of the taxicab, or an object dropped on the floor? This was the purpose with which

The two officers alighted and approached on opposite sides of the cab (R. 7-8, 19, 67-68, 80, 132), although neither had a search warrant or an arrest warrant. Officer Beckman, who approached on the right, identified himself to the driver and defendant (R. 7-8, 56-57). In the succession of events which followed, a package was seized by the officers which, upon subsequent analysis, was found to contain heroin. In an arrest report filed shortly thereafter, Officer Beckman described the sequence of events as follows (R. 85-86, 150):

> "When Officer Beckman identified himself to arrestee, arrestee reached inside his right jacket pocket extracting a white object. When arrestee did this Officer

---

you approached the cab at that time, is that not correct, Officer Beckman?

"A. The purpose was, I thought he possibly had narcotics in his possession."

Beckman's purported justification of his actions was as follows (R. 14-15):

"What information did you have that would lead you to believe that there was narcotics either concealed in the cab or on either the passenger or the driver of the cab at that particular point?

"A. By the defendant's actions in the place where I first observed him and the known locality.

"Q. You mean because somebody got into a cab this aroused your suspicion?

"A. His manner of getting into the cab.

"Q. Well, did he get in in an unusual manner?

"A. Yes.

"Q. Describe how he got into the cab.

"A. The cab was parked on the parking lot. The defendant walked out to the lot, walked over to the sidewalk, looked northward on Flower and south on Flower and down First Street. He looked in that direction. Then he walked back. After walking around on the parking lot he walked back and then got in to the cab."

Beckman testified that the area adjacent to the Los Angeles Civic Center where defendant was seen entering the taxicab had a poor reputation, in the officer's opinion, from the standpoint of narcotics enforcement (R. 54).

Beckman opened the cab door and observed the arrestee drop the object to the floor by his feet.

"Arrestee attempted to alight from the cab. At this time Officer Beckman attempted to retrieve the object dropped on the floor. Officer could see at this time that the object was a rubber condom containing a large quantity of powdery substance which resembled heroin. Officer Beckman then informed arrestee he was under arrest for suspicion of narcotics."

The package was seized by the arresting officers and upon subsequent analysis was found to contain heroin[5] (R. 8-9).

During his testimony in the District Court, many months after the events in question, Officer Beckman recalled the sequence of events somewhat differently. This time he stated that he saw the defendant drop the object before the door of the cab was opened and suggested that defendant participated in the opening of the cab door (R. 64). Defendant's efforts to cross examine Beckman with respect to the changes in his story were met with objections by the trial court itself (R. 84-86).

A more detailed account of the foregoing events was given by another of the Government's witnesses, Granville McCready Smith, the driver of the Yellow Cab in which defendant was riding. Mr. Smith's testimony was as follows (R. 109-112):

---

[5] Officer Beckman testified that he first found out that the package contained heroin after Policewoman Grace gave him the object (R. 75). While Officer Beckman testified that contraceptives were often used to carry narcotics, Policewoman Grace testified that during the six-month period in which she had been assigned to the area in question this was the first time she had seen a contraceptive used to carry narcotics (R. 78).

"The Witness: Well, I first saw Officer Beckmann at the intersection of First and State Streets when I was waiting for a traffic signal.

"Now, prior to that time what I was doing, I was driving eastwardly on First Street.

"The Court: How did you happen to stop at First and State Streets?

"The Witness: I stopped for a red light.

"The Court: Was there a car ahead of you?

"The Witness: No, I was in the center lane straddling the street car tracks.

"By Mrs. Bulgrin:

"Q. Was there other traffic there, do you recall or not?

"A. Well, I didn't notice. There wasn't any going the same direction that we were in that block. Whether there were cars facing the other way waiting for the signal, I don't recall. I didn't notice.

"Q. When did you first see Officer Beckmann that evening?

"A. When I was waiting for the traffic signal at First and State.

"Q. Was the light red at that time?

"A. Yes.

"Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

"A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left.

"The windows on the cab, that is, the front window at any rate, was rolled up, and if he was saying anything to me I couldn't hear, but he gestured with his

flashlight, I believe, toward his billfold and I got the idea that he was policeman.

"Q. He wasn't in uniform at the time?

"A. No. And I didn't see a badge. I merely saw his billfold that he was holding in his hand.

"The Court: Then what happened?

"The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

"By Mrs. Bulgrin:

"Q. What did the defendant do? What was happening as far as the defendant was concerned?

"A. Well, he appeared to be becoming quite agitated.

"Q. While he was inside the cab?

"A. While he was inside the cab, yes.

"Q. When the door opened did he get out?

"A. Well, there are other events before he got out.

"The Court: What were they?

"The Witness: Well, I am trying to get these in the right order. It is difficult because things happened quickly.

"The Court: Yes?

"The Witness: Officer Beckmann—

"The Court: Did you see Policewoman Grace?

"The Witness: Not at that time.

"The Court: Go ahead.

"The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, 'We are police officers.' I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a

hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, 'We are police officers.'

"I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

"But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him, what is the big idea, something like that. I don't remember my exact words.

"As I recall then Officer Beckmann took the defendant by the arm—

"By Mrs. Bulgrin:

"Q. That was after the defendant got out of the cab, is that correct?

"A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab.

"Q. That is just your impression?

"A. The defendant was sitting right next to the door on the right-hand side in the back seat, and I didn't hear what Officer Beckmann said to the defendant.

"Q. During the time these events, Mr. Smith, were happening, in which direction were you facing?

"A. Well, I was facing toward the defendant and Officer Beckmann. I turned my head to see what was going on.

"Q. You turned your head to the right, is that correct?

"A. Yes.

"Q. Did you watch the proceedings as they transpired?

"A. Yes.

"The Court: How could you tell the defendant was agitated?

"The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated."[1]

B. State Court Proceedings.

Following defendant's arrest by the Los Angeles Police, criminal proceedings were instituted against him in behalf of the People of the State of California, charging him with a violation of Section 11500 of the *California Health and Safety Code*[2] which prohibits, *inter alia*, possession of narcotics.

On March 12, 1957, a preliminary hearing was had in the state court at which the only testimony, aside from that of an expert witness who identified a white powder as heroin, was that of the arresting officers, Beckman and Grace (R. 5-23).

On May 10, 1957, the action came on for trial in the Superior Court of the State of California, in and for the

[1] Smith testified that after defendant got out of the cab he repeatedly protested his innocence (R. 113).

[2] For full text of the Statute, see Appendix C to this Brief.

County of Los Angeles, before the Honorable Walter H. Odemar. Trial was had solely on the reporter's transcript of the preliminary hearing. After considering the testimony of Officers Grace and Beckman as set forth in the preliminary transcript, and argument of counsel addressed thereto, Judge Odemar granted defendant's motion to suppress the package of narcotics on the ground that it had been illegally seized without a warrant, incident to an unlawful arrest, and thereupon rendered a judgment of acquittal (R. 22-24), commenting as follows with respect to the illegality of the arrest, search and seizure (R. 24):

> "I can't possibly see how this arrest could have originally been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man could think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted . . ."

C. Federal Court Proceedings.

Following Judge Odemar's acquittal of defendant in the State Court, Officer Beckman, after consulting his superiors, enlisted the aid of the federal narcotics authorities (R. 50-51, 60, 70, 71-72, 154). The manner in which Officer Beckman instituted the federal prosecution was described by him as follows (R. 50-51):

"Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

"A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case with him.

"He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

"Q. Whose idea was that? Was that yours or Captain Madden's?

"A. Mine.

"Q. In other words, did you institute the discussion with Captain Madden?

"A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him."*

---

* Defendant's efforts to establish a pattern of cooperation between state and federal authorities encountered objection from the trial court itself (R. 60):

"Q. Officer Beckmann, have you ever turned over evidence in a narcotics case to the Federal officers prior to the arrest in this case?

"The Court: What is the materiality of that?

"Mr. Grossman: The Government on direct introduced evidence to show his overall course of dealing, as to whether he had any dealings with Federal officers, whether there was any participation.

On June 19, 1957, an indictment containing a single count was filed by the Federal grand jury for the Southern District of California, charging defendant with receiving, concealing and transporting illegally imported narcotics in violation of 21 U.S.C., Section 174 (R. 1).[9] Both the description of the alleged narcotic and the date of its concealment were identical with those testified to by Officers Beckman and Grace in the state court proceeding.[10]

Accordingly, on July 15, 1957, defendant moved to suppress the evidence in question on the ground that evidence obtained by state officers through illegal search and seizure may not be used in a federal court proceeding in an effort to circumvent the state exclusionary rule. The trial court denied defendant's motion, and in so ruling indicated, *inter alia*, that it considered itself bound by decisions of the Ninth

---

"The Court: In this case.

"Mr. Grossman: I think that a question of a course of—is material. One of the theories on which we are proceeding here would be that in doing this he was acting as an agent for the Federal authorities, and it is our position that this would be material to determine whether he was in the custom of gathering evidence for the Federal authorities, indicating for whom he was acting in this particular case.

"Mrs. Bulgrin: Your Honor, I think if he was not acting in behalf of the Government in this particular case, if he had been so acting, assuming for the sake of argument, in the past, in other cases, it would not be material.

"The Court: I do not think it would be material. Since I raised the objection myself, I will sustain the objection."

[9] The jurisdiction of the District Court was based upon 18 *U.S.C.*, Section 3231.

[10] Defendant appeared for arraignment on June 24, 1957; as he was without funds with which to retain counsel, counsel was appointed by the Court to assist with his defense. On July 1, 1957, defendant entered a plea of not guilty of the offense with which he was charged. The Government stipulated that it was seeking to try the defendant for the same possession, arising out of the same transaction, of which he had been acquitted in the state court proceedings (R. 32-33).

Circuit holding that evidence unlawfully obtained by state officers without federal participation was nevertheless admissible in a federal criminal prosecution[11] (R. 27, 98-99).

Following the District Court's denial of defendant's motion to suppress, the case came on for trial, the jury returned a verdict of guilty (R. 28) and the trial court imposed a sentence of *twenty years imprisonment, the maximum permitted by law* (R. 28).

The Government's primary evidence at the trial was the package allegedly seized from defendant and the testimony of Officers Beckman and Grace with respect to the events surrounding the seizure of it, the same evidence which the state court had held inadmissible in the prior state court proceedings and which the defendant had previously sought to have excluded. Defendant objected to the admission of this evidence, but his objection was overruled (R. 145) and a motion to acquit was denied (R. 162).

Following the judgment of the trial court, defendant appealed in due course to the Court of Appeals for the Ninth Circuit, which affirmed the judgment of the trial court (R. 175). Thereafter defendant filed in this Court a motion for leave to proceed *in forma pauperis* and a petition for certiorari. On April 20, 1959, this Court made its order granting defendant's petition for writ of certiorari as to the following questions (R. 176):

---

[11] In this regard the trial court observed (R. 98-99):

"But I think in this case that I am bound with respect to the decision by the State courts by the doctrines of the Parker case in 183 F.(2d), the Anderson case in 237 F.(2d), both Ninth Circuit cases, and the Lustig case in 338 U.S., all of which bear on the question and all of which have as the underlying philosophy that unless there is Federal participation shown then the search by the State officers, even though it be unlawful, does not permeate the Federal proceedings. For that reason I adhere to my ruling in that respect."

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

Summary of Argument

Petitioner stands convicted on the basis of evidence unlawfully obtained in violation of his constitutional rights. The state courts expressly declined to receive this tainted evidence. The federal courts should be equally steadfast in refusing to sanction an unlawful search and seizure by admitting the evidence so obtained.

The fact that the unlawful search in the instant case was conducted by state officers does not suggest a contrary result. That the constitutional infringement is equally grave whether the unlawful search be conducted by state or federal officers can no longer be doubted. That the exclusionary rule affords the only effective safeguard yet devised to curtail such infringements is likewise free from doubt. Accordingly, the same considerations which led this Court to exclude evidence unlawfully seized by federal officers likewise compel the exclusion of evidence unlawfully seized by state officers.

Moreover, where, as in the instant case, evidence is unlawfully obtained in a state whose courts have adopted the exclusionary rule, there are additional reasons for excluding unlawfully obtained evidence in a federal court proceeding. Here, exclusion of the evidence by the federal courts will serve to further the common federal-state pro-

gram, while admission of the evidence will impair the operation of the state exclusionary rule and thereby undermine the common program aimed at securing police observance of basic constitutional rights.

Finally, aside from its deficiencies in terms of constitutional doctrine, the "silver platter" doctrine would be unworkable from a practical standpoint, since the existence of federal-state cooperation, upon which the doctrine's application would depend, is rarely susceptible of proof.

Accordingly, petitioner's conviction, being grounded upon evidence obtained by an unreasonable search and seizure by the state police, should not be permitted to stand.

ARGUMENT

I. The Evidence Upon Which Petitioner Was Convicted Was Obtained in Violation of His Constitutional Rights.

A. The Evidence Upon Which Petitioner Was Convicted, Having Been Obtained by State Police in Violation of State Law, Was Indelibly Tainted and Should Not Be Admitted in a Federal Court.

It is clear that insofar as the legality of the seizure under state law is concerned, the Federal Courts are bound to accept the determination of the state courts.

In this case the state courts have made a final determination that the evidence in question was unlawfully obtained as a matter of state law. It is submitted that the evidence thereby became indelibly tainted and should not be admitted in a federal criminal prosecution. In this regard we believe that the following comment of Mr. Justice Holmes in *Olmstead* v. *United States*, 277 U.S. 438, 470-471 (1928), is particularly apposite:

". . . And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the state not by the law of the United States. It is true that a state cannot make rules of evidence for courts of the United States, but the state has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against state law than when inciting to the disregard of its own. I am aware of the often-repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."

B. The Search and Seizure of the Evidence in Question Was in Clear Violation of the Constitutional Standards Established by This Court.

It is undisputed that the search and seizure in the present case were conducted without a warrant. Accordingly, the sole question is whether the circumstances were such that a search without warrant was justified. *A review of the authorities demonstrates beyond question that it was not.*

Brinegar v. *United States*, 338 U.S. 160 (1949);
Johnson v. *United States*, 333 U.S. 10 (1948);
United States v. *Di Re*, 332 U.S. 581 (1948);
Carroll v. *United States*, 267 U.S. 132 (1925).

The *Brinegar* and *Carroll* cases establish the periphery of the area of search and seizure. Indeed, since the searches in those cases were based upon express statutory authority, the periphery there established may well transcend the bounds of permissible search in cases, such as the present, where such statutory authority is lacking.

See:

United States v. *Di Re*, *supra*, 332 U.S. 581.

The *Carroll* case, *supra*, involved enforcement of the National Prohibition Laws. The circumstances under which prohibition agents conducted the search and seizure in that case were described as follows by the Court (267 U.S. 161):

> "... They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids; i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great

source of supply for their stock to Grand Rapids, where they plied their trade. . . ."

In upholding the validity of the search and seizure, the Court stated the governing rule as follows (267 U.S. 149):

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. . . ."

In so holding, however, the Court was careful to point out that it was not sanctioning the searching of automobiles upon the mere whim of the officers concerned (267 U.S. 153-154):

> ". . . It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . ."

The *Brinegar* case involved facts substantially similar to those in the *Carroll* case. After noting that "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt" the Court in *Brinegar* went on to observe (338 U.S. 176-177):

> ". . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. . . ."

In upholding the search involved in *Brinegar*, the Court was careful to point out that both the *Brinegar* and *Carroll* cases were of a borderline nature, *i.e.*, that they lay at the periphery of the area of permissible search and seizure (338 U.S. 177-179):

> "The troublesome line posed by the facts in the Carroll case and this case is one between mere suspicion and probable cause. That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. No problem of searching the home or any other place of privacy was presented either in Carroll or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference. But one who recently and repeatedly has given sub-

stantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

"This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion. The question presented in the Carroll case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that the facts within the officers' knowledge when they intercepted Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action. We cannot say this conclusion was wrong, or was so lacking in reason and consistency with the Fourth Amendment's purposes that it should now be overridden. Nor, as we have said, can we find in the present facts any substantial basis for distinguishing this case from the Carroll case."[12]

"The borderline nature of the *Carroll* and *Brinegar* cases is further evidenced by the decision of the Court in *United States* v. *Di Re, supra.*"

In the *Di Re* case, the Court, in holding that circumstances which might justify the search of a vehicle would

[12] Mr. Justice Jackson dissented in *Brinegar*, declaring (338 U.S. 184):

"... I dissent because I regard it as an extension of the Carroll case, which already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion. ..."

not *per se* authorize a search of its occupants, noted that the *Carroll* case and its progeny involved searches made pursuant to the enforcement provisions of the National Prohibition Act, observing that "In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' the Carroll decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. . . . (332 U.S. 586).

In holding the search in *Di Re* unlawful, the Court expressly rejected a contention that the search might be justified by its fruits, observing (332 U.S. 596):

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Finally, the Court emphatically rejected any "appeal to necessity", declaring in language which is equally applicable to the instant case (332 U.S. 596):

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the

lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

In *Johnson* v. *United States, supra,* an attempt was made to justify a search and seizure on the basis of observations made by the police in the course of their illicit enterprise. In holding that the officers could not thus lift themselves by their own bootstraps, the Court declared (333 U.S. 18):

> "The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant. It points out specifically, referring to the time just before entry, 'For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den.' And it says, ' * * *-that when the agents were admitted to the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and quite properly stakes the rights to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.
>
> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to

be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Applying the principles of the *Carroll*, *Brinegar*, *Di Re* and *Johnson* cases to the instant case, it is clear that the search and seizure with which we are here concerned was unlawful.

Here, the state police testified that at the time of the events in question they had no idea as to petitioner's identity and were not searching for a participant in any known crime. Nor did they have any information with respect to the taxicab in which he was riding or the driver of the cab. Rather, their basis for embarking upon the search in question was (1) the fact that petitioner allegedly looked about before getting into the taxicab, and (2) the fact that he entered the cab in an area (adjacent to the Los Angeles Civic Center) which one of the officers felt had a "bad reputation" for narcotics offenses.

Upon reflection it will be seen that neither of these circumstances was sufficient to create even a mere suspicion of wrongdoing on the part of petitioner, let alone probable cause to believe that he had committed a felony. If the fact that one glances about before entering a taxicab is to furnish the basis for a search by the police, no one could safely use that form of transportation. Likewise, it is hardly consistent with our notions of democracy for a police officer to decide that a particular area of the city is "off limits" to the extent that persons seen in that area will subject themselves to police search. As the state court judge aptly observed in suppressing the very evidence involved in the present case (R. 24):

"I can't possibly see how this arrest could have originally been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted . . ."

The unlawfulness of the search and seizure in the instant case may be further illustrated by comparing its circumstances with those in *Carroll* and *Brinegar*. In both the *Carroll* and *Brinegar* cases the police did not undertake pursuit until "they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings." (338 U.S. 167.) Moreover, in each of those cases the driver was proceeding toward a probable illegal market. Even in the face of such facts the Court regarded the *Carroll* and *Brinegar* cases as "borderline" cases. None of the foregoing factors, which were relied upon as justifying the searches in *Carroll* and *Brinegar*, are present in the instant case, which falls far beyond the pale of permissible search and seizure.

Furthermore, as pointed out in *United States* v. *Di Re*, *supra*, "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change

character from its success." (332 U.S. 596.)[14] The legal or illicit nature of the enterprise must be determined in light of the facts known to the police at the time they embark upon it. In terms of the present case, the legality of the

---

[14] See also, *United States* v. *Irvin*, 86 F.Supp. 362 (W.D. Ark. 1949), where the court, in holding unlawful a search and seizure based upon a much stronger factual showing than that involved in the instant case, observed (86 F.Supp. 364):

> "It is admitted that the City Police making the search had no search warrant. They had no information from any source that would lead them to believe that the defendant was bringing into the city an automobile load of contraband liquor on that particular day or at that particular time and place. They did have the license number and a general description of the automobile as being one that was sometimes used in the illegal transportation of contraband liquor, that is, illegal under the ordinances of the City of Hot Springs, the law of Arkansas and the law of the United States. In other words, the automobile bearing that particular license number and general description was suspect, but that information did not constitute reasonable grounds to permit the City Police to search the automobile at any and all times wherever it might be found, but in order to constitute probable cause to search without a search warrant, some additional information must have been possessed so that a reasonable person would have had the right to believe that the suspected automobile was engaged in the particular violation at the identical time of the search. The fact that the search disclosed an actual violation cannot be considered, and whenever the testimony of Lt. Rowe and Officer Hughes is considered, the conclusion is irresistible that they acted upon the belief by Lt. Rowe that the license number of the defendant's automobile was one of the suspected license numbers which he had obtained from some source and placed in his book for future reference and use. This was not sufficient, in my opinion, to constitute probable cause and to warrant a search without a search warrant. Therefore, the search was illegal under the Federal, as well as the State, law."

The Court went on to observe (86 F.Supp. 366):

> "The court realizes fully that the effect of the decision in this case may be to release the defendant, who was actually engaged in violating the law, but it is of more importance that our constitutional guarantees be preserved than that any particular individual be punished for a particular offense.
>
> * * *"

search must be determined, not in light of what the police may have eventually uncovered, but rather in light of the facts known to Officers Grace and Beckman at the time they undertook to follow the taxicab in which defendant was riding for some two miles, pull up behind it while it was *en route* to its destination, and approach on opposite sides of the cab for the admitted purpose of attempting to uncover evidence of a narcotics violation. *Up to this point, it is clear that there was not the slightest evidence of any wrongdoing on the part of the defendant, yet the officers had already embarked upon their illegal enterprise.*

Subsequently, Beckman claimed to have seen defendant remove a white object from his jacket pocket. The officer's narrative with respect to this phase of his enterprise appears to have undergone a convenient transition between the time of his original arrest report and the time of his testimony in the federal court on petitioner's motion to suppress.[14] At a time when the events were freshest in his mind, Beckman declared that upon seeing the defendant take the object from his pocket Beckman opened the door of the taxicab, thus proceeding still further in his predetermined purpose to arrest and search the defendant. Even at this point it is clear that the officer was not proceeding upon probable cause. The defendant's alleged conduct in taking an object from his pocket would in itself hardly appear a suspicious circumstance. Indeed, it is almost inconceivable that anyone concealing contraband would, upon being approached by the police, take it from its place of concealment and place it in plain view of the officers.

Lest it be urged that the present requirements with respect to searches and seizures should be relaxed in the

[14] The officer's testimony in the state court appears to represent a midway point in this transition.

interests of greater ease of law enforcement, we wish to call the Court's attention to the following pertinent observation of Mr. Justice Jackson in *Brinegar* (338 U.S. 183):

> "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the acts in terms of money.
>
> "But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.
>
> "And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies."

C. The Search and Seizure in the Instant Case May Not Be Justified as Incident to a Lawful Arrest.

1. *In Determining the Lawfulness of an Arrest Without Warrant, the Courts Will Look to State Law Insofar as That Law Comports With Federal Constitutional Standards.*

While the lawfulness of a search and seizure under the federal constitution is primarily, of course, a matter for determination by this Court, where it is sought to justify the search as incident to a lawful arrest it is necessary to establish not only that federal constitutional standards have been satisfied, but also that the law of arrest of a particular state has been complied with.

See, *e.g.*:

United States v. *Di Re*, *supra*, 332 U.S. 581;
Johnson v. *United States*, *supra*, 333 U.S. 10.

2. *The Search and Seizure in the Instant Case Were Not Incident to Any Lawful Arrest Under California Law.*

Insofar as the lawfulness of the arrest under state law is concerned, it would appear that the decision of the state courts holding that the arrest was unlawful under California law should be accepted by the federal courts.

See:

Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940);
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938).

However, even assuming that the lawfulness of the arrest under California law were a matter for determination by the federal courts independent of the decision of the state court, it is clear that the search and seizure cannot be justified as incident to a lawful arrest.

The basic California statute governing arrest without warrant is Penal Code, Section 836. At the time of the arrest in the instant case, Section 836 provided:[15]

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night when there is reasonable cause to believe that he has committed a felony."

Since the arresting officers conceded that they had no knowledge of any felony having been committed and that no charge had been made against the defendant prior to the events in question, it is clear that grounds three and four of Section 836 are inapplicable.

---

[15] The Section was subsequently amended to read as follows:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant arrest a person:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

It is equally clear that at the time the officers embarked upon their unlawful enterprise, defendant was not committing any offense in their presence, so that ground one is likewise inapplicable. (See *People* v. *Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955).)

In *People* v. *Brown, supra,* the court expressly rejected a contention that where the defendant is in fact guilty of a felony, a search incident to an arrest is authorized under subsection two of Section 836, whether or not the arresting officers have reasonable cause so to believe.

The court, in following a doctrine similar to that voiced by this Court in *United States* v. *Di Re, supra,* emphasized that a search incident to an arrest may not be justified by its fruits, explaining (45 Cal. 2d 644):

> "If, therefore, it is necessary to rely on the search to justify the arrest, the conclusion is inescapable that a search that cannot be justified by what it turns up cannot justify the arrest. Moreover, whether or not the arrest of a guilty defendant is lawful, it is clearly unreasonable if the officer has no 'reasonable cause' to believe the defendant guilty, and a search incident thereto can be no more reasonable than the arrest itself."

It is therefore clear that the search in the instant case may not be justified as incident to an arrest under subsection two of Section 836.

The only possible basis remaining for the arrest in the instant case is subsection five, namely, that there was reasonable cause to believe that defendant had committed a felony. *A review of the California cases demonstrates that the search in the instant case cannot be justified on this ground.*

See, *e.g.*:

People v. *Sanders*, 46 Cal. 2d 247, 294 P.2d 10 (1956);
People v. *Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956);
People v. *Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955);
People v. *Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894);
People v. *Goodo*, 147 Cal. App. 2d 7, 304 P.2d 776 (1956);
People v. *Harris*, 146 Cal. App. 2d 142, 304 P.2d 178 (1956).

See also:

Wirin v. *Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

The classic definition of reasonable or probable cause such as would justify an arrest under the law of California is that adopted in the leading case of *People* v. *Kilvington*, *supra*, where the court observes (104 Cal. 92):

> "There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C.J., in Bacon v. Towne, 4 Cush. 217: 'There must be such a state of facts,' said he, 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.' . . . "

In applying the foregoing standard, the California courts have refused to sustain searches incident to arrests premised on factual showings akin to that in the instant case.

Thus, in *People* v. *Simon, supra,* the court states with reference to conduct similar to that which allegedly aroused the suspicions of the police officers in the instant case (45 Cal. 2d 650):

> ". . . the mere fact that two persons walked a few blocks in a warehouse district at night and then retraced their steps would not constitute reasonable cause to believe either had committed a felony, even if the officer had entertained such a belief. . . ."

and again (45 Cal. 2d 650-651):

> "Under these circumstances, to permit an officer to justify a search on the ground that he 'didn't feel' that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were. Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up. . . ."

In *People* v. *Harris, supra,* the circumstances of the arrest were described by the court as follows (146 Cal. App. 2d 143):

> "Leon Harris was arrested by Officer Giannini at approximately 2:15 or 2:20 a.m., April 17, 1955. Officers Giannini and Hess were on foot patrol duty when they observed appellant in the doorway of a liquor store at the corner of Fillmore and McAllister Streets. He was talking with another person, and every few moments would leave the doorway, look down the street and return to the doorway. The officers testified that he was acting very suspiciously."

After noting that "A search cannot be justified by what it produces" (146 Cal. App. 2d 147) the court concluded (146 Cal. App. 2d 147):

> ". . . We are of the view that the evidence is insufficient to show that the search was reasonable and that the judgment must be reversed on this ground."[16]

In *People* v. *Gale, supra,* defendant was arrested after stopping at a sheriff's check station at the Mexican border. The circumstances of the arrest and the search incident thereto were described by the court as follows (46 Cal. 2d 255):

> ". . . One of the officers noticed that the front of the car appeared to have been in a recent accident and asked defendant to drive to the side of the road and stop in front of the sheriff's substation office. Defendant got out and told one of the officers that the car had been damaged in an accident about a month before in Los Angeles. This officer asked defendant and his friend to come into the office and told another officer to give the car a complete 'shakedown.' With the aid of his flashlight, the inspecting officer found under the right hand side of the front seat a spoon, a capsule of white substance, a needle, a medicine dropper, and a small scabbard. The white substance was later identified as a narcotic. . . .
>
> * * * * *"

In holding that there was no reasonable cause for the arrest and search, the court declared that the mere possibility that such cars were being used to further criminal ventures could not justify the stopping and searching of

---

[16] See also, *People* v. *Goodo*, 147 Cal. App. 2d [illegible], 10, 304 P.2d 776 (1957).

automobiles lawfully using the highways "in the hope that some criminals will be found." [17] (46 Cal. 2d 256.)

In *People* v. *Sanders, supra,* the officers went to defendant's place of business, and after entering the front room of the shop, which was open to the public, looked through a door leading to a second room, and on the basis of that observation entered the second room, which was not open to the public, and arrested defendant for bookmaking. In holding the search unlawful, the court observed (46 Cal. 2d 249-250):

> "The attorney general contends that when the officers looked through the door into the second room, they had reasonable cause to believe that defendant had committed a felony and that he was committing the offense of occupying premises for the purposes of bookmaking in their presence, and that therefore the arrest and search were lawful. . . .
>
> "When the officers looked through the door they saw nothing that was incriminating. They merely saw defendant standing behind a desk with a pencil in his hand and two pads of paper in front of him. There was writing on the pads. Defendant was operating a record store open to the public, and just as in the case of any shopkeeper, businessman, or professional man, he

---

[17] In *Wirin* v. *Horrall, supra,* the court, in holding the indiscriminate use of police roadblocks unlawful, declared (85 Cal. App. 2d 501):

> "Persons lawfully within the United States of America are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law. . . ."

See, also *Badillo* v. *Superior Court,* 46 Cal. 2d 269, 294 P.2d 23 (1956); *Gascon* v. *Superior Court,* 169 A.C.A. 367, 337 P.2d 201 (1959).

might reasonably be expected to have pencils and pads of paper available for making notes and memoranda for use in the legitimate conduct of his business. Moreover, the fact that the pads of paper were of the kind used by bookmakers in the area is of no significance. They were ordinary small pads of paper of the sort that may be purchased in any stationery store and that are undoubtedly used by all sorts of persons for all sorts of purposes. Similar pads may be found in almost every office, and certainly, the fact that bookmakers also use them cannot constitute reasonable cause to believe that everyone using them is engaged in bookmaking."

The court concluded that (46 Cal. 2d 250):

"... before the arrest and search defendant's activities appeared to be perfectly consistent with the lawful conduct of his record business. ..."

The court specifically rejected a contention by the State that "the officers could reasonably conclude that defendant's apparently innocent activities were bookmaking on the ground that another person had been arrested for bookmaking at the record shop the day before." (46 Cal. 2d 251) —a far more plausible contention than the "suspicious neighborhood" theory upon which the Government relies in the instant case.

Applying the foregoing authorities to the facts of the instant case as heretofore summarized, it is clear that the search in the instant case may not be justified as incident to a lawful arrest made on probable cause.

It should be noted that we are not here concerned with a mere routine interrogation of a pedestrian of occupant of

a parked automobile under circumstances which have aroused the suspicion of a police officer.

cf., *People* v. *Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956) (male occupants of a car parked in lovers lane fled approaching patrol car);

People v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) (questioning at 3 a.m., of occupants of parked cab not unusual "in view of the hour and the unusual conduct of the occupants");

People v. *Rodriguez*, 140 Cal. App. 2d 865, 296 P.2d 38 (1956) (questioning by a patrolling officer of one who appeared to be under the influence of narcotics).

In the instant case, not only was there a lack of suspicious circumstances to justify the course of conduct adopted by the police with respect to petitioner, but that conduct itself was of a far different nature than that involved in the "routine interrogation" cases. Here the police followed and overtook a vehicle proceeding along the center lane of a public highway, albeit at the particular instant where the police chose to "make their move" the cab may have been stopped for an instant at a traffic signal. Accordingly, such cases as *People* v. *Martin*, *People* v. *Blodgett* and *People* v. *Rodriguez*, *supra*, can have no application here.

The foregoing distinction is pointed up in *People* v. *Harvey*, 142 Cal. App. 2d 728, 730-732, 299 P.2d 310 (1956):

> "About 8:30 p.m. the police officers arrived at the stake-out. They concealed themselves across the street from appellant's residence behind a tree. A few minutes later appellant arrived on the scene in a 1950 Cadillac. Appellant got out of the Cadillac and apparently stood by it a little while. A blue coupe approached and parked just behind appellant's car. Appellant walked

up to the occupant of the coupe, who remained in his car, and talked with him several minutes. The coupe then drove away. Appellant walked across the street toward his residence. He looked at something that was on the windshield of another car and then disappeared from the officers' view.

"A few minutes later the officers saw appellant coming down an outside flight of stairs from his upstairs apartment. Appellant stood for a few seconds at the foot of his stairs looking up and down the street with his hands in his overcoat pockets. He crossed the street to where the officers were standing behind the tree. Appellant looked up and down the street. The officers then decided to take him into custody.

"Officer Russo testified: 'We thought something was wrong.'

"The officers testified that they identified themselves as officers, showed their police badges and asked appellant to take his hands out of his pockets. Appellant did not comply but backed off from the officers. A struggle ensued. Three other officers arrived and appellant was subdued. All of the police officers were in civilian clothes. Officer Russo took a package from appellant's hand which was later found to contain marijuana.

* * * * * *

"We agree with appellant's contention that the marijuana was obtained by an illegal search and seizure.

"When the officers stepped from behind the tree and approached the defendant with the avowed purpose of placing him under arrest they had no legal ground for arresting him. His conduct up to that time was such as any man may legally engage in on a public street without arousing suspicion of misconduct. He had parked his car, talked to a person in another car, looked at

something on the windshield of a third car, gone into his house, left his house again with his hands in his pockets, crossed the street and stood on the sidewalk looking up and down. These were all innocent actions that any law-abiding citizen should be able to engage in without fear of search or arrest. The fact that defendant was believed to be dealing in narcotics, added to such innocent conduct as the officers observed, was not sufficient to justify defendant's arrest without a warrant. . . .

"The People however argue that since the officers had the right to interrogate a man found upon the street at night, People v. Blodgett, 46 Cal. 2d 114 (293 P.2d 57), the conduct of the defendant in backing away and refusing to take his hands from his pockets constituted suspicious conduct which justified the officers in seizing and searching the defendant. People v. Blodgett, supra; People v. Martin, 46 Cal. 2d 106 (293 P.2d 52).

"The difficulty with this argument is that the police officers were not interrogating the defendant, but by their own unqualified testimony they were arresting him. Aiello testified that just before they stepped out from behind the tree: 'I says, "Shall we place him under arrest" and he says "Okay," so I walked out first.' Russo testified 'we nudged each other and says, "let's place him into custody."'

"From the testimony of the officers it is clear that they approached the defendant, identified themselves to him as officers and requested him to remove his hands from his pockets as a step in his arrest, which they had already determined upon. They had no intention of interrogating him. They had already decided to arrest him and were carrying out that decision. Since the arrest was illegal their illegal conduct cannot become legal by what was disclosed while they were engaged in making the illegal arrest. . . ."

II. The Mere Fact That the Unlawful Search and Seizure in the Present Case Was Conducted by State Officers Does Not Preclude Application of the Exclusionary Rule.

Preliminary Statement: Since, as we shall demonstrate hereafter, adoption of the "silver platter" doctrine by this Court would serve to undermine the effectiveness of the exclusionary rule, we believe it is in order to emphasize the importance of the exclusionary rule and the consequent need to reject a proposed principle of law which would serve to vitiate its effectiveness. Toward this end we have set forth as Appendix A to this brief a series of extracts from opinions and writings in the field which point up the importance of the exclusionary rule as the only effective safeguard of the basic constitutional rights secured by the Fourth Amendment and its counterparts in the constitutions of the various states.

Moreover, since we are particularly concerned in the instant case with a course of action tending to undermine the effectiveness of the California exclusionary rule, we believe it is likewise appropriate to relate the background of that State's exclusionary rule and the benefits which have derived from its adoption. The latter materials are set forth in Appendix B to this brief.

A. The "Silver Platter" Doctrine Has Not Been Adopted by This Court.

While the doctrine that evidence obtained by state officers without federal participation or cooperation may be admitted in a federal prosecution, *i.e.*, the so-called "silver platter" doctrine, has been mentioned in some of the decisions of this Court (see e.g., *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 345, 346 (1914) and *Byars* v. *United States*, 273 U.S. 28, 47 S.Ct. 248, 249, 250 (1950)) the ques-

tion whether the doctrine is to be adopted or rejected by this Court is still an open one.[18]

Thus, in *Lustig* v. *United States*, 338 U.S. 74, 69 S.Ct. 1372 (1949), the Court expressly declined to pass upon the question.[19]

Again in *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 155 (1957), this Court observed (355 U.S. 158, footnote 10):

> "It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. See Lustig v. United States, 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1373-1374, 94 L.Ed. 1819. . . ."

B. The "Silver Platter" Doctrine Has Been Rejected by the Better Reasoned Cases in the State Courts.

The state courts in those states which have adopted the exclusionary rule have been faced on occasion with a prob-

---

[18] The lower federal courts are divided on the question. Compare *Rios* v. *United States*, 256 F.2d 173 (C.A. 9, 1958); *Costello* v. *United States*, 255 F.2d 389 (C.A. 8, 1958) and *Serio* v. *United States*, 203 F.2d 576 (C.A. 5, 1953) with *Hanna* v. *United States*, 260 F.2d 723 (D.C. 1958), discussed *infra*, pages 48-52.

[19] In commenting upon the *Lustig* case, one writer has observed (50 A.L.R. 2d 373):

> "In the most recent case decided by the United States Supreme Court and dealing with the question discussed at this point, Lustig v. United States (1949), 338 U.S. 74, 93 L.ed. 1819, 69 S.Ct. 1372, the majority of the court left open the question whether an illegal search by state officers without federal participation bars the introduction of the fruits of the search in a federal court (the holding being based on a finding of federal participation). However, some of the justices (Murphy, Douglas, and Rutledge, JJ., and apparently also Black, J.) expressed the view that evidence should be suppressed in a federal court even if the search had been made solely by state officers and the state officers were not acting to enforce federal law."

lem analogous to that with which we are here concerned, namely, whether evidence unlawfully seized by *federal officers* should be excluded in a criminal prosecution in the *state courts*. While there is language in a few cases suggesting that such evidence should not be excluded, the better-reasoned authorities, which appear to reflect the weight and trend of authority, have held that such evidence will be excluded.

See, *e.g.*:

State v. *Arregui*, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463 (1927);
Walters v. *Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923);
Little v. *State*, 171 Miss. 818, 159 So. 103 (1924);
State v. *Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924);
Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*; 42 Corn. L.Q. 346, 348 (1957).

And see:

Ramirez v. *State*, 123 Tex. Crim. 254, 58 S.W.2d 829 (1933);
State v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2 (1930).

Contra:

State ex rel. Kuhr v. *District Court*, 82 Mont. 515, 268 Pac. 501 (1928).

In *State* v. *Hiteshew*, *supra*, the court comments as follows on the state of the law in this area (292 Pac. 4):

". . . In Kentucky, Missouri and Idaho it is held that, when evidence is obtained by federal officers by a seizure unlawful under the laws of the United States, it must be suppressed in a prosecution in the state

courts. State v. Arregui, 44 Ida. 43, 254 Pac. 788, 52 A.L.R. 463; State v. Rebasti, 306 Mo. 336, 267 S.W. 858, 861; Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839; Caudill v. Commonwealth, 202 Ky. 730, 261 S.W. 253; State v. Horton, 312 Mo. 202, 278 S.W. 661. In the Idaho and Missouri cases it happened that the warrants were invalid under both state and federal laws, but we think that we have correctly construed the holding of these courts. The rule laid down in these cases is, that it is as much the duty of the state courts as it is of the federal courts, to uphold the provisions of the 4th amendment to the constitution of the United States regarding unreasonable searches, and that if the evidence of the federal officers is obtained unlawfully, and cannot for that reason be received in the federal courts, it cannot be transformed into lawful evidence by being offered in the state courts. . . ."

While the rulings in these cases are admittedly not controlling here as precedent, the reasoning of the courts which have excluded such evidence is deserving of more than passing notice.

Thus, in *State* v. *Rebasti, supra,* the court states (306 Mo. 347, 348, 349):

"It is unthinkable that a State court is powerless to protect the constitutional rights of its citizens, guaranteed by the Federal Constitution. To hold the evidence of the Federal agents admissible in this case is to pronounce that doctrine. It is to say that the act of an officer, or of any other individual, is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question.

* * * * *

"Suppose a Federal officer should make an unreasonable search, and in doing so outrage the citizen's rights under the United States Constitution. Can it be said that the unlawful act of the officer could become lawful because of the court in which it is questioned? Suppose the injured citizen should sue him in the State court for damage done in violation of his constitutional rights, and the officer in defense should plead that, although he acted unlawfully, the plaintiff had no right to prove it in a State court. Does anyone suppose the plea would be good?

"In this case the Federal officer violated the constitutional rights of the defendant, and violated the constitutional restrictions upon his own behavior as a Federal officer. Had the case been pending in the Federal court he could not have testified, because his act in procuring his information was unlawful. His case, however, is pending in the State court and it is contended that he may testify because his act was *lawful*. By that theory his act becomes lawful or unlawful, not because of its quality, but because of the court which decides the question. He can bring his misdemeanor to a State court and there have his lawless disregard of his official duty appraised as a meritorious performance.

* * * * *

"The only safe and sound construction of the situation is to say that when a Federal officer violates the constitutional restriction upon his conduct so as to make evidence procured in such violation incompetent, that it is incompetent everywhere offered." (Emphasis the court's.)

Again in *Walters* v. *Commonwealth*, *supra*, the court observes (199 Ky. 186, 187):

"But as the same act of a citizen of both a state and the United States renders him amenable to both sovereignties under which he must live, if each but protects him under similar guaranties of their respective constitutions against unlawful activities of its own officers, it would result that the state officials might search a citizen without a warrant and the evidence thus unlawfully obtained be used against him in the federal courts, and he likewise would be without protection in the state courts against unreasonable searches by federal officers other than by an action for damages, which both the courts of this Commonwealth and of the United States have held inadequate.

"Surely the same guaranties by the dual sovereignty mean more than that, and they should be so construed as more effectively to protect the citizen's immunities from governmental interference, which each within its sphere has declared sacred.

* * * * *

"We therefore conclude that the evidence introduced against defendant was competent, provided the federal search warrant under which it was obtained was valid, but not otherwise."

In *Little* v. *State, supra*, the court states (171 Miss. 823):

". . . Many acts in common are denounced as crimes both by the Congress and the Legislatures of the states. If the fruits of an illegal search under federal authority can be used in the state courts, and vice versa, the constitutional guaranty would be to a large extent nullified."

Again, in *State* v. *Arregui, supra*, the court comments as follows (254 Pac. 796):

"It would be anomalous for a state court to say: 'The state demanded that the federal government and federal authority be thus restricted against the violation of the rights of a citizen of this state; yet if they do violate the Constitution and violate the rights of our citizens, we will not enforce the observance of those provisions, but will effectuate the evil by recognition and judicial sanction of the fruits of such violation. And although there are the same restrictions in the state Constitution, we will judicially sanction the violation of your rights under the federal Constitution, although to do so we must become a party to the violation of both Constitutions.'

"In the hands of the state courts is placed the power to prevent, in part, the violation of the rights of a citizen by federal authorities in violation of state and federal Constitutions. This is not only in the power of the state court, but its duty. If, as said in the Burdeau Case, the 4th Amendment to the federal Constitution 'was intended as a restraint upon the activities of sovereign authority, . . . governmental agencies,' and in the Byars Case, 'the assurance against any revival of' the 'misuse of power in the matter of searches and seizures,' embodied in the 4th Amendment, 'is not to be impaired by judicial sanction of equivocal methods, . . . which, in reality, strike at the substance of the constitutional right,' and as the same intention prompted the adoption of the provisions of our state Constitution 'to secure the people against unauthorized official action,' there seems no other logical conclusion than that unauthorized official action should not receive judicial sanction by receipt of evidence in a state court, although secured by federal officers, which, upon the same showing of facts would be denied in a federal court, when to do so would

be to violate the same right guaranteed by both the federal and state Constitutions."

It is submitted that the reasoning of the courts in the foregoing cases is equally cogent in the converse situation, as presented in the instant case, and that here, too, the Court should not permit our dual system to serve as a vehicle for frustrating the common policy of both State and Nation.

C. Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in *Wolf* v. *Colorado*.

This Court, while refusing to compel states to adopt the federal exclusionary rule which now prevails in California, has recognized that an unlawful search and seizure in itself constitutes a denial of Due Process.

Wolf v. *Colorado*, 338 U.S. 25, 27-28 (1949).

Thus, Mr. Justice Frankfurter, speaking for the Court in *Wolf* v. *Colorado*, *supra*, stated (338 U.S. 27-28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. . . ."

In light of the foregoing holding, it seems inconceivable that evidence unlawfully obtained by state officers through an unlawful search and seizure which, under *Wolf*, would constitute a violation of petitioner's rights under the Federal Constitution, could nevertheless be admitted in a federal criminal proceeding. That the constitutional infringement is equally grave whether the unlawful search be conducted by state or federal officers can no longer be doubted. That the exclusionary rule affords the only effective safeguard yet devised to curtail such infringements is likewise free from doubt. (See Appendix A.) Accordingly, the same considerations which led this Court to exclude evidence unlawfully seized by federal officers likewise compel the exclusion of evidence unlawfully seized by state officers.[20]

---

[20] Various writers in the field have noted that the decision of this Court in the *Wolf* case is irreconcilable with the "silver platter" doctrine.

See, *e.g.*, 50 *A.L.R.* 2d 531, 573-574; *Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities*, 51 Col. L. Rev. 128 (1951).

As one writer has observed (51 Col. L. Rev. 130):

> "Recently, however, the Supreme Court stated that the Fourteenth Amendment protects against unreasonable searches and seizures by state officials, although due process does not require a state court to exclude evidence so procured. Reluctance to interfere with state court procedure appears to afford a reasonable basis for applying this rule with respect to the admission of evidence in state courts. In the federal courts, however, suppression of evidence unreasonably obtained by either federal or state officers would not seem justified, since it would provide a degree of deterrence which would not interfere with any delicate federal-state relationship."

See:

Hanna v. *United States, supra,* 260 F.2d 723.

In the *Hanna* case the court held that evidence obtained by an unreasonable search and seizure by state officers without any participation or cooperation by federal authorities is inadmissible in a federal court—precisely the position for which petitioner is here contending. In so holding, the court, in an opinion by Judge Hastie, reviewed the history of the "silver platter" doctrine and concluded that that doctrine was irreconcilable with the holding of this Court in *Wolf*. The courts which continued to apply the "silver platter" doctrine after the *Wolf* decision had failed to give due consideration to the *Wolf* case, Judge Hastie declared. After noting that several members of this Court had recognized that unreasonable searches and seizures by state and federal officers should be accorded similar treatment in the federal courts,[21] Judge Hastie concluded (260 F.2d 728-729):

---

[21] In this regard Judge Hastie observed (260 F.2d 726-727):

"Even more striking are expressions of opinion by three other Justices. Mr. Justice Douglas, dissenting from the ultimate holding in Wolf v. People of State of Colorado, supra, tersely stated his conclusion that state and federal courts should be required to exclude evidence obtained by either state or federal officers through an unreasonable search. 338 U.S. at page 40, 69 S.Ct. at page 1367. On a subsequent occasion he reaffirmed his conviction that 'we should be alert to see that no *unconstitutional* evidence is used to convict any person in America.' See Irvine v. People of State of California, 1954, 347 U.S. 128, 149, 152, 74 S.Ct. 381, 394, 98 L.Ed. 561.

"Mr. Justice Clark has gone just as far. Only stare decisis has persuaded him to support the ultimate Wolf conclusion that a state court may use unconstitutionally obtained evidence. See Clark, J., concurring in Irvine v. People of State of California, supra, 347 U.S. at page 138, 74 S.Ct. at page 386. In the federal courts he would apply the basic generalization of the Weeks case, 'that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions.' See Breithaupt v. Abram, 1957, 352 U.S. 432, 434, 77 S.Ct.

"On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by

---

408, 409, 1 L.Ed. 2d 448. And in the light of his dissatisfaction with the ultimate Wolf holding it is impossible to believe that he would restrict this considered generalization to cases where the violation of the Constitution has been by federal officers.

"Finally, Mr. Justice Harlan has put his view of the impact of Wolf on Weeks quite succinctly:

"'* * * the only difference I can see between the Wolf decision and Weeks v. United States, * * * excluding in federal criminal trials evidence obtained in contravention of the Fourth Amendment, is the difference between state and federal courts; in each case, the substance of the constitutional command is the same, but the nature of enforcement varies with the forum.' See dissenting opinion in Rea v. United States, 1956, 350 U.S. 214, 218, 220, 76 S.Ct. 292, 296, 100 L.Ed. 233.

"The 'constitutional command', if we understand Justice Harlan correctly, enjoins federal and state officers alike from unreasonable searches and seizures. Thus, the Justice seems to be saying that the Weeks case requires one type of enforcement of this comprehensive command in federal courts, while the Wolf case permits less drastic enforcement in state courts.

"On the other hand, one Justice seems to have committed himself since and despite the Wolf case to a continuing recognition in federal trials of the original Weeks distinction between federal and state seizures. We think this is the necessary meaning of Mr. Justice Burton's concurrence in the dissent in Lustig v. United States, supra, 338 U.S. at page 80, 69 S.Ct. at page 1374, although we are not unmindful that he joined later in Mr. Justice Harlan's dissent in the Rea case, discussed above. In any event, no other Justice now in active commission seems to have approved the Weeks distinction since the Wolf decision.

"In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the Weeks and the Wolf decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the Weeks holding as to state-seized evidence nor our own Shelton decision can properly be regarded as binding precedents in the light of the subsequent Wolf ruling and the cited indications of the present views of so many justices."

violation of the Constitution should be excluded. In this area, as Mr. Justice Jackson has reminded us, decision 'whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. Rules Crim. Proc., 26.' See Irvine v. People of State of California, 1954, 347 U.S. 128, 134-135, 74 S.Ct. 381, 384, 98 L.Ed. 561. What then should be the controlling considerations when unconstitutionally obtained evidence is offered in a court of the United States? One influential consideration is that which moved Justice Holmes and Justice Brandeis in their celebrated Olmstead dissents. Mr. Justice Holmes put it this way:

"* * * * government ought not to use evidence obtained and only obtainable by a criminal act. * * * I think it a less evil that some criminals should escape than that the government should play an ignoble part." Olmstead v. United States, 1928, 277 U.S. 438, 469, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944.

"This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the 'ignoble part' by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be imposed

against the violation of our fundamental law. This very point was made in the Weeks case with reference to evidence which federal officers had obtained by unreasonable search:

"'The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.' 232 U.S. at page 392, 34 S.Ct. at page 344.

"But the Wolf case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

"Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the Weeks case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.' It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction

of excluding such evidence from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence."

D. Application of the "Silver Platter" Doctrine to Evidence Unlawfully Seized by State Officers in an "Exclusionary Rule" State Would Undermine the Effectiveness of That State's Exclusionary Rule. Contrary to the Common Federal-State Policy.

Even where the state courts admit evidence obtained by unlawful search and seizure, there are compelling reasons why such evidence should nevertheless be excluded by federal courts. But where evidence is so obtained in a state, such as California, where the courts exclude evidence unlawfully obtained, the case for excluding such evidence is even stronger. In such a situation the exclusion of the evidence by the federal courts serves to further the common federal-state program, while admission of such evidence impairs the operation of the state exclusionary rule and thereby undermines the common program aimed at securing police observance of basic constitutional rights.

Accordingly, regardless of the rule adopted in other circumstances, it is clear that the federal courts should exclude evidence unlawfully obtained by state officers in a state which follows the exclusionary rule.[22]

---

[22] The opinion of the Court of Appeals states that the "silver platter" doctrine is applicable "even though the state wherein the evidence was seized, as in the case of California, has a state exclusionary rule similar to the federal court exclusionary rule announced in Weeks, supra." In support of that statement, the Court cites three cases, namely, *United States* v. *Stirsman*, 212 F.2d 900 (C.A. 7, 1954), *Jones* v. *United States*, 217 F.2d 381 (C.A. 8, 1954), and *Parker* v. *United States*, 183 F.2d 268 (C.A. 9, 1950). However,

As one writer has observed:

> "Surely in states whose courts would not admit such evidence, the federal courts should not do so either. In those states, it has been determined by proper authority that the rule of evidence is a necessary measure for protecting state citizens against unlawful state action. Federal courts ought to recognize this policy. The Supreme Court must carefully scrutinize state criminal procedure to keep it up to minimal due process standards. Should it not also see that federal courts help rather than hinder state efforts to bring law enforcement up to even higher standards?
>
> ". . . Excluding evidence illegally obtained by state officers may prevent full discovery of the truth. But if restraining federal officers from unconstitutional activity is important enough to cause federal courts to keep out some relevant evidence, surely state efforts to control state officers are important enough in the federal scheme of things to merit similar treatment."
>
> Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 43 Corn. L.Q. 346, 363 (1957).

The foregoing observations find support in the decision of this Court in *Rea* v. *United States*, 350 U.S. 214 (1956). In the *Rea* case, the Court held that a federal court might properly enjoin federal officers from testifying in a state court action regarding the results of an illegal search and seizure, so that the state forum might not be used to

---

a reading of the *Stirsman*, *Jones* and *Parker* cases, *supra*, reveals that assuming that the states in question did have the exclusionary rule at the time of those decisions, the effect of *the state exclusionary rule was neither raised nor considered* in any of those cases. Moreover, neither *Stirsman*, *Jones* nor *Parker* involved a prior state court determination that the evidence in question was unlawfully seized and therefore inadmissible in a state court prosecution.

circumvent the exclusionary rule followed in the federal courts.

Clearly, if the federal courts are to prevent use of state forums to circumvent the federal prohibition against use of evidence obtained by illegal searches and seizures, the federal courts should not sanction use of their own forums to circumvent a similar state prohibition.

Such a result is dictated not only by considerations of comity and a respect for our state judicial systems, but also by the need to further the common policy adopted by both the California Supreme Court and this Court, *each of which has found the exclusion of unlawfully seized evidence the only effective safeguard against unconstitutional searches and seizures.*

Here, the search and seizure was made by state officers. Just as the federal courts are charged with primary responsibility for regulating the conduct of federal officers, as forcefully demonstrated in the *Rea* case, so must the California courts be accorded a like opportunity with respect to California police officers. If the California courts find, as they have found in the instant case, that in order to prevent unlawful searches and seizures they must exclude the evidence at issue here, the federal courts should assist, rather than frustrate, that undertaking.[23]

Yet, in the instant case state police officers, after failing to obtain a conviction in the state courts because of the tainted nature of their evidence, have been permitted to

[23] The recent decision of this Court in *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 155 (1957), holding that evidence obtained by state officers in violation of the Anti-Wire Tapping Act is inadmissible in a federal court action, likewise reflects recognition of the underlying theory which petitioner is urging here, namely, that our dual system should not be used to circumvent an exclusionary rule rooted in deep-seated policy considerations.

obtain a conviction in a federal court by enlisting the aid of federal authorities. The dangers inherent in such a practice are readily apparent. A state police officer need no longer be concerned with an adverse final decision of a state court excluding evidence as obtained in violation of the constitutional rights of the accused. *All the state officer need do, as was done in the instant case, is to "cross the street" to the Federal courthouse.*

E. The "Silver Platter" Doctrine Would Be Unworkable.

Aside from its deficiencies in terms of constitutional doctrine, the "silver platter" doctrine would be unworkable from a practical standpoint. Since the touchstone of the doctrine is federal-state cooperation, application of the doctrine presupposes the feasibility of establishing whether such cooperation is present in a given case. In practice, however, though such cooperation is undoubtedly quite prevalent, it is rarely susceptible to proof. Certainly the cooperating authorities themselves can hardly be expected to come forward to aid the defendant. Yet without their aid the task of the defendant is usually a hopeless one, particularly when we consider that federal-state cooperation in this area is reflected in tacit understandings rather than formal compacts. In light of these difficulties of proof, it is submitted that the "silver platter" doctrine is unworkable from a practical standpoint, as well as theoretically unsound.[24]

---

[24] It should be noted that petitioner was prevented from fully exploring on cross-examination the question whether the conduct of state officers in the instant case was pursuant to a general pattern of ecoperation (R. 60), although it is only logical to assume that the willingness of the federal authorities to prosecute the defendant at the instance of the arresting state officers reflects a broader pattern of cooperation.

CONCLUSION

The evidence upon which petitioner was convicted was obtained by an unreasonable search and seizure conducted in violation of petitioner's constitutional rights. Considerations of policy and precedent dictate that a conviction so obtained should not be permitted to stand. Accordingly, we respectfully request that the decision below be reversed.

Respectfully submitted,

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California
Counsel for Petitioner

Of Counsel:
HARVEY M. GROSSMAN

APPENDIX A

Value and Importance of the Exclusionary Rule

Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144 (1948).

"Particularly when they are dealing with known criminals, or the 'criminal classes,' police and prosecutors tend to regard lawless methods as justifiable. For the average policeman the community tends to become divided into good men and bad men; the 'good' men are the more respectable elements, and the 'bad' men are not only the known criminals but the 'suspicious characters,' the vagrants, and the members of unpopular minority groups. For these groups, constitutional privileges are deemed waived in varying degrees, depending on the disfavor with which the policeman views the suspect. The prosecutor, whose record of convictions is his political opportunity, may be tempted to adopt the same attitude, albeit sometimes in a more sophisticated form.

"Police lawlessness excused as expediency has been encouraged by apathy and occasional affirmative support both from the public and its elected leaders. Defendants are to a large extent protected, for statutes generally provide that civil servants' salaries cannot be garnished in the event of civil suit, and policemen are frequently indemnified from loss and defended without cost. But the wronged plaintiff, who is likely to be both ignorant and poor, receives little or no help from the public, and must usually proceed alone for whatever damages he can collect. Chief executives of municipalities, states, and the nation itself have aided in the handicapping process by their reluctance to demand prosecution of offending officers, and in some cases are themselves responsible for policies of wholesale illegality.

"In the unique area of lawless enforcement of the law, the neglect, if not the adverse interest, of the normal prosecuting agencies and the public leaves the courts alone to intervene. Since the normal law enforcement agencies are

themselves the law-breakers, control of this kind of crime is peculiarly difficult and also doubly important."

58 Yale L.J. 145-147

"Of the possible explanations for the rule, the simplest and best seems to be that the searches and seizures clauses require it, if the granted immunity is to be in fact enjoyed. The necessity which mothered the rule was the widespread practice of illegal search, untrammeled as it was by existing legal or social restraints. Then and in recent years civil suits for damages have seldom been undertaken even by innocent search victims, for the same reasons which militate against the recovery of persons injured by any other police illegality. Despite the ineffectiveness of civil suit, governments have generally failed to provide an effective statutory remedy for the search victim, and have uniformly failed to prosecute the wrongdoers. Thus the exclusionary rule's specific purpose is to furnish a needed deterrent to illegal search not otherwise provided by law."

58 Yale L.J. 151-152

"The contention that the rule is bad because it operates to release the guilty men is analytically neither more nor less than an argument that in criminal investigation the end justifies the means. If the rule allows unmerited acquittals, it does so only in the cases where the illegality is indispensable to the conviction. An after-the-fact prohibition on use of the evidence prevents convictions in no greater degree than would effective prior direction to police to search only by legal means. Exclusion is restrictive only to the same extent as a high standard of police discipline. If too many criminals are acquitted in court or released prior to trial because legal means of investigation are required by the rule, it may well be concluded that the definition of legal means is too rigid, or that the police are too lax or inefficient to find legal means of acquiring evidence. But the maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary."

58 Yale L.J. 161-162

"That the exclusionary device does not function to deter the individual searcher is not proof of its inefficiency. The rule operates to hold the prosecutor and the police chief responsible for illegal search by their investigators, and to punish them, in a real sense, by marring their record of convictions and their reputation for effective and proper law enforcement. By consistently bringing pressure to bear on top officials to discipline their own organizations, exclusion might be more effective than an action against the guilty searcher, which would seldom reach above the lower ranks. Since existing deterrents which depend on prosecution and civil suit are ineffective, and since the courts have no direct means of reaching individual offenders, a sanction against their superiors seems at least a reasonable substitute for purposes of judicial administration.

"The only alternative method of judicially controlling lawlessness which seems within the courts' inherent powers, an extension of the contempt sanction to apply to deviating officials, appears at best inadequate. With the aid of statutory authorization, it might be invoked against one seeking to introduce illegally seized evidence, on the theory that he thereby affronted the dignity of the court. But the threat of the sanction would discourage the use not only of tainted evidence, but all evidence whose procurement was of even doubtful legality. The procedure would operate to free even more guilty defendants than does the exclusionary rule, and would similarly fail directly to punish the searching officer. If, on the other hand, the sanction were directed to officers violating search warrant instructions, on the theory that the violation was a contempt of court, the sanction would fail to include the great majority of illegal search cases, in which no warrant is secured at all, for these cases would never reach a court. Furthermore, the incentive would be all the greater for neglecting to use the warrant.

"Thus, of the two methods available to the courts to control illegal search, the exclusionary rule seems potentially the more effective."

58 Yale Law Jour. 161-163

"Until legislators see fit to assert control over the whole array of official crimes by the creation of independent prosecuting bodies especially designed to govern law enforcement methods, the exclusionary rule will serve a useful purpose in its limited field. At least as to investigative illegalities, which must pass review of the courts, the rule is potentially an effective deterrent. Formulation of the rule in accord with its function would help fulfill a responsibility which the courts themselves have at least temporarily assumed."

58 Yale Law Jour. 164

Monrad G. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 N.W. L. Rev. 65 (1957).

"When the rules are agreed upon, what remedies ought to be available for their infraction? Two historic possibilities bear directly upon the offending officer: The criminal sanction and a civil tort action redressing illegal conduct. By the common consent of almost all who have studied the problem, these remedies just do not work. The sanctions have been available at all times and yet they are hardly ever invoked. Save in the most extreme case, what prosecutor would jeopardize his good relationship with the police by prosecuting one of them criminally? The very success of his task depends upon constant cooperation with the police. The tort remedy runs into a whole series of troubles. What are the damages in the case of an illegal search, particularly in the case of a plaintiff just convicted by the fruits of the search? Punitive damages may not be available. In the action for civil recovery, the testimony of the plaintiff will almost certainly be required which, in turn, opens up the possibility of introducing evidence of the criminal conviction to impeach credibility. In any event testimony concerning reputation will be admissible for the purpose of mitigating damages. It is important to keep in mind that the victims of police misconduct are not likely to be the most substantial citizens in the community. A person who has been convicted of crime may be deprived of his right to sue by a civil death statute, and if he is currently in custody he may have the greatest difficulty in getting out in order to testify. Even

with the best of plaintiffs, how can damages in money compensate for the injury to emotions, dignity and temper?

"Even if the tort remedy were effective, it would not be a wise one because of the excess of caution which it might instill in the police. At best tort recovery is rough justice to the defendant. Moreover, the amount recovered is proportional to the injury rather than the fault, and a very slight deviation from the norm could cause a very great injury. If tort recovery were common, policemen would do well to be exceedingly cautious—certainly an undesirable result. For this reason, I doubt the soundness of proposals for statutory damages minima if the officer must pay them.

"Our aim should be to provide a system which could tolerate isolated instances of over-zealousness were they promptly and justly corrected by means proportioned to the fault of the officer. This objective is consistent with proposals to put financial responsibility upon the units of government rather than the individual officer. We may assume that the city or state would get rid of only those officers who are especially costly because they habitually overstep the mark. Yet I cannot believe that governmental units will bear any substantial expenditure to compensate the bums, grafters, petty crooks or big-time operators who are the most probable victims of illegal police misconduct. Until some governmental unit somewhere is in fact giving adequate civil recovery for unconstitutional law enforcement, I retain my stubborn doubt whether the idea can be made to work.

"The proposal for a civil rights office, independent of the regular prosecutor, for prosecution of offenses committed by police officers has several disadvantages. First, it does not provide for compensation to the injured party. In this respect it is no better than the exclusionary evidence rule. Secondly, it either puts the sanction directly on the police officer by making him liable to prosecution for each instance of misconduct or leaves prosecution so haphazard as to fail as a deterrent. Administrative elimination of the unfit for repeated disregard of civil rights is to be preferred to the caution which might result from harsh punishment of the individual officer for a single misdeed. Thirdly, even if direct punishment is thought useful, I doubt whether many

juries will convict a policeman who has violated the civil rights of a gangster.

"Systematic discipline within the police department itself would be a splendid sanction if it were done. We just do not have examples of cities or other governmental units which have insisted that departments get rid of police who refuse to obey the search and seizure rules.

"The rule excluding the use of illegally obtained evidence is the most effective remedy against lawless law enforcement. Note I have said that it is the *most* effective remedy—not that the rule is maintained without cost nor that it is completely effective, nor that a remedy of far greater effectiveness cannot be imagined. I say only that in this very real world of ours it is the best we have. . . ."

52 N.W. L. Rev. 72-74

Osmond K. Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 Ia. L. Rev. 472 (1948).

"No survey of this subject would be complete without some discussion of the wisdom of the federal rule which permits suppression of evidence illegally seized. It has often been attacked as affording too great protection to criminals. In the Prohibition Era it was bootleggers, today it is gunmen who, it is said, are so protected. In a recent article the author recognized that the existing rule is motivated largely by a fear that in time of mass hysteria evidence obtained by unlawful searches and seizures might be used in suppression of freedom of thought, but he doubts the likelihood that the rule will survive should such a time arise and thinks its current existence too great a price to pay for this doubtful insurance. Our entire democracy, however, is built on the belief that our judges will stand up against mass hysteria. To destroy the Fourth Amendment in the fear lest this belief be unfounded and for the purpose of catching some criminals is surely to burn down the house in order to roast the pig. After all, most of the criminals let go by reason of the application of the federal rule might safely be in prison had the law enforcement

officers used more care in procuring the evidence against them."

33 Ia. L. Rev. 498

"The existing rule rests upon a double basis: that, as Justices Holmes and Brandeis long ago observed, it is dirty business for the Government to make use of evidence obtained in violation of law; that otherwise the guaranty of the Fourth Amendment ceases to have meaning. It is undeniable, of course, that illegal searches continue despite the risk that a conviction based on the evidence seized may be reversed. But that they would be much more numerous if there were no such risk can hardly be doubted. . . ."

33 Ia. L. Rev. 499

"In the last analysis the issue will be determined by what is considered to be the greater good. Is it more important to preserve the privacy of the citizen or to catch a few criminals? Those who drafted the Bill of Rights made a choice based on their reading of history. As was said by Mr. Justice Jackson:

> ". . . the forefathers . . . designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

"The wisdom of the founders still seems best. We can rely on the Supreme Court to give an interpretation of the term 'reasonable' which will permit careful enforcement officers to function while at the same time setting itself resolutely against any attempt to whittle away the great protection afforded by the Fourth Amendment."

33 Ia. L. Rev. 500

Wolf v. *Colorado*, 338 U.S. 25 (1949).

"Mr. Justice Rutledge, dissenting.

"'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' Similarly, one

should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. Accordingly, although I think that all 'the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment,' Adamson v. California, 332 U.S. 46, dissenting opinion at page 124, 67 S.Ct. 1672, at page 1683, 91 L.Ed. 1903, 171 A.L.R. 1223, I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment 'to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, * * * valid as against the states.' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.

"But I reject the Court's simultaneous conclusion that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction —exclusion of evidence taken in violation of the Amendment's terms—failure to observe which means that 'the protection of the 4th Amendment * * * might as well be stricken from the Constitution.' Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177. For I agree with my brother MURPHY's demonstration that the Amendment without the sanction is a dead letter. . . ."

338 U.S. 48

Mr. Justice MURPHY, dissenting.

"Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.

"Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

"This has been perfectly clear since 1914, when a unanimous Court decided Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177. 'If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense,' we said, 'the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.' 'It would reduce the Fourth Amendment to a form of words.' Holmes, J., for the Court, in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 24 A.L.R. 1426.

"Today the Court wipes those statements from the books with its bland citation of 'other remedies.' Little need be said concerning the possibilities of criminal prosecution. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered. But there is an appealing ring in another alternative. A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home. Why not put the old writ to a new use: When the Court cites cases permitting the action, the remedy seems complete.

"But when an illusory remedy this is, if by 'remedy' we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. In those that do, the plaintiff must show the real ill will or malice of the defendant, and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. If that burden is carried, recovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded. In addition, some states limit

punitive damages to the actual expenses of litigation. See 61 Harv. L. Rev. 113, 119-120. Others demand some arbitrary ratio between actual and punitive damages before a verdict may stand. See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-1181. Even assuming the ill will of the officer, his reasonable grounds for belief that the home he searched harbored evidence of crime is admissible in mitigation of punitive damages. Gamble v. Keyes, 35 S.D. 644, 153 N.W. 888; Simpson v. McCaffrey, 13 Ohio 508. The bad reputation of the plaintiff is likewise admissible. Banfill v. Byrd, 122 Miss. 288, 84 So. 227. If the evidence seized was actually used at a trial, that fact has been held a complete justification of the search, and a defense against the trespass action. Elias v. Pasmore (1934) 2 K.B. 164. And even if the plaintiff hurdles all these obstacles, and gains a substantial verdict, the individual officer's finances may well make the judgment useless—for the municipality, of course, is not liable without its consent. Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?

"The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

"If proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule. St. Louis, for example, demands extensive training in the rules of search and seizure, with emphasis upon the ease with which a case may collapse if it depends upon evidence obtained unlawfully. Current court decisions are digested and read at roll calls. The same general pattern prevails in Washington, D. C. In Dallas, officers are thoroughly briefed and instructed that 'the courts will follow the rules very closely and will detect any frauds.' In Milwaukee, a stout volume on the law of arrest

and search and seizure is made the basis of extended instruction. Officer preparation in the applicable rules in Jackson, Mississippi, has included the lectures of an Associate Justice of the Mississippi Supreme Court. The instructions on evidence and search and seizure given to trainees in San Antonio carefully note the rule of exclusion in Texas, and close with this statement: 'Every police officer should know the laws and rules of evidence. Upon knowledge of these facts determines whether the * * * defendant will be convicted or acquitted. * * * When you investigate a case * * * remember throughout your investigation that only admissible evidence can be used.'

"But in New York City, we are informed simply that 'copies of the State Penal Law and Code of Criminal Procedure' are given to officers, and that they are 'kept advised' that illegally obtained evidence may be admitted in New York courts. In Baltimore, a 'Digest of Laws' is distributed, and it is made clear that the statutory section excluding evidence 'is limited in its application to the trial of misdemeanors. * * * It would appear * * * that * * * evidence illegally obtained may still be admissible in the trial of felonies.' In Cleveland, recruits and other officers are told of the rules of search and seizure, but 'instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the "admissionist" group of states when evidence obtained by an illegal search is presented to the court.' A similar pattern emerges in Birmingham, Alabama.

"The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy. There are apparent exceptions to the contrast—Denver, for example, appears to provide as comprehensive a series of instructions as that in Chicago, although Colorado permits introduction of the evidence and Illinois does not. And, so far as we can determine from letters, a fairly uniform standard of officer instruction appears in other cities, irrespective of the local rule of evidence. But the examples cited above serve to ground an assumption that has motivated this Court since the Weeks case: that this is an area in which judicial action has positive effect upon the

breach of law; and that without judicial action, there are simply no effective sanctions presently available."

338 U.S. 42-45

People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

"'Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule, but against the substantive guarantee itself. The exclusion of the evidence is the only sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.'

"'It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of a search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge . . ., the burden is on those who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to the inclusion in this amendment of the one sanction which will give the constitutional provision, however it is defined, genuine meaning.' Senator Robert F. Wagner speaking before the New York Constitutional Convention of 1938. (Record of the New York State Constitutional Convention 559-560, reprinted in Allen, The Wolf Case, 45 Ill. L. Rev. 1, 19.)"

44 Cal. 2d 450 (Footnote)

"If the unconstitutional guarantees against unreasonable searches and seizures are to have significance they must be

enforced, and if courts are to discharge their duty to support the state and federal Constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. If such were the case there would be more force to the argument that a particular criminal should not be redressed for a past violation of his rights by excluding the evidence against him. Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. 'Alternatives [to the exclusionary rule] are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all.' (Murphy, J., dissenting in Wolf v. Colorado, supra, 338 U.S. 25, 41; see also Weeks v. United States, 232 U.S. 383, 393 [34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834].) 'The difficulty with [other remedies] is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion.' (Jackson, J., in Irvine v. California, supra, 347 U.S. 128, 137.) Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer. 'Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.' (Frankfurter, J., dissenting in Harris v. United States, 331 U.S. 145, 156 [67 S.Ct. 1098,

91 L.Ed. 1399].) There is thus all the more necessity for courts to be vigilant in protecting these constitutional rights, if they are to be protected at all. People v. Mayen, 188 Cal. 237 [205 P. 435, 24 A.L.R. 1383], was decided over thirty years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are non-existent. In short, the constitutional provisions are not being enforced.

"Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. Moreover, the same considerations that justify the privilege against self-incrimination are not irrelevant here. As Wigmore pointed out, that privilege, just as the prohibition against unreasonable searches and seizures, is primarily for the protection of the innocent. 'The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." (8 Wigmore on Evidence

[3d ed.] §2251, p. 309.) Similarly, a system that permits the prosecution to trust habitually to the use of illegally obtained evidence cannot help but encourage violations of the Constitution at the expense of lawful means of enforcing the law. (See Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 172.) On the other hand, if courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.

"It is contended, however, that the police do not always have a choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves. It was rejected when those provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted. He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught. 'It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.' (Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 173.) The situation presented differs only in degree from other situations where the choice must be made between securing convictions by illegal means or allowing criminals to go free. Cases undoubtedly arise where a violation of the privilege against self-incrimination, a coerced confession, the testimony of defendant's spouse, a violation of the attorney-client privilege or other privileges is essential to the conviction of the

criminal, but the choice has been made that he go unpunished. Arguments against the wisdom of these rights and privileges, just as arguments against the wisdom of the prohibitions against unreasonable searches and seizures, should be addressed to the question whether they should exist at all, but arguments against the wisdom of the constitutional provisions may not be invoked to justify a failure to enforce them while they remain the law of the land."

44 Cal. 2d 447-450

Weeks v. *United States*, 232 U.S. 383 (1914).

". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . ."

". . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

The absence of any effective alternative is evidenced by the following passage from *Nueslein* v. *District of Columbia*, 115 F.2d 691, 695 (footnote 16):

"On November 23, 1921, the following provision became law: 'That any officer * * * who shall search any private dwelling as defined in (Title 27) the National Prohibition Act * * * without a warrant directing such search * * * shall be guilty of a misdemeanor. * * *.' 42 Stat. 223, 18 U.S.C.A. §53. While the effect of this provision has been judicially recognized (Poulos v. United States, 6 Cir., 8 F.2d 120, 121, there is not one reported case where an officer has

been tried for violation. This provision was repealed on August 27, 1935 (49 Stat. 872), but at the same time there was enacted a similar statute applying to the 'enforcement of any law of the United States.' 49 Stat. 877, 18 U.S.C.A. §53a. Likewise, to date, there is not one reported case of an officer tried for violation of this provision."

Perhaps one of the strongest testimonials to the exclusionary rule's effectiveness is to be found in the fact that, while it has long been referred to as a "minority" rule, in point of fact it has now been adopted in almost one-half the states. (See 50 A.L.R. 2d 536, listing 21 states which have adopted the rule plus two others where it is partially applicable.)

APPENDIX B

Background and Effect of the California Exclusionary Rule

1. Circumstances Leading to California's Adoption of the Exclusionary Rule.

The considerations which led California to adopt the exclusionary rule are clearly stated by Mr. Justice Traynor of the California Supreme Court in the leading case of *People* v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), in which California adopted the exclusionary rule. Commenting upon the police lawlessness evidenced in the *Cahan* case, Justice Traynor observed (44 Cal. 2d 436, 437-438):

"Most of the incriminatory evidence introduced at the trial was obtained by officers of the Los Angeles Police Department in flagrant violation of the United States Constitution (4th and 14th Amendments), the California Constitution (art. I, §19), and state and federal statutes. (Pen. Code, §§146, 602; 18 U.S.C.A. §§241, 242; 42 U.S.C.A. §1983.) Gerald Wooters, an officer attached to the intelligence unit of that department testified that after securing the permission of the chief of police . . .

* * * * *

"The forcible entries and seizures were candidly admitted by the various officers. . . .

"Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them."

44 Cal. 2d 436, 437-438

Justice Traynor went on to explain the importance of preserving the constitutional right to be free from unreasonable search and seizure (44 Cal. 2d 438-439, 442):

"Thus both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in *no* case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional provisions were adopted and the choice was made that all the people, guilty and innocent alike, should be secure from unreasonable police intrusions, even though some criminals should escape. Moreover, the constitutional provisions make no distinction between the guilty and the innocent, and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects.

"'Of course, this like each of our constitutional guarantees often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers, and effects which is indispensable to the individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.' (Jackson, J., dissenting in Harris v. United States, 331 U.S. 145, 197, 198 [67 S.Ct. 1098, 91 L.Ed. 1399]; see also United States v. Di Re, 332 U.S. 581, 595 [68 S.Ct. 222, 92 L.Ed. 210].)"

44 Cal. 2d 438-439

"Meanwhile, pursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule. . . ."

44 Cal. 2d 442

After noting the various arguments which had been urged against adoption of the exclusionary rule, Justice Traynor stated the court's conclusions as follows (44 Cal. 2d 445-446):

"Despite the persuasive force of the foregoing arguments, we have concluded, as Justice Carter and Justice Schauer have consistently maintained, that evidence obtained in violation of the constitutional guarantees is inadmissible. People v. Le Doux, 155 Cal. 535 (102 P. 517); People v. Mayen, 188 Cal. 237 (205 P. 435, 24 A.L.R. 1383), and the cases based thereon are therefore overruled. We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

"When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. [N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.' (Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376].) Out of regard for its

own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' (See MacNabb v. United States, 318 U.S. 332, 345 [63 S.Ct. 608, 87 L.Ed. 819].) Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants (Lee On v. Long, 37 Cal. 2d 499, 502-503 [234 P.2d 9], and cases cited); *a fortiori*, they should not extend that aid and thereby permit the consummation of illegal schemes of the state itself. (See Roberts, J., concurring in Sorells v. United States, 287 U.S. 435, 453 [53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249].) It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites everyman to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 485 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376] . . ."

44 Cal. 2d 445-446

Professor Barrett has commented as follows upon the California experience:

"The United States and the California Constitutions guarantee the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures' and provide that 'no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' As a practical matter in California, however, these constitutional provisions have not served to place effective limits upon the discretion of law enforcement officers, nor have they given to the citizen judicially enforceable guarantees against illegal police searches.

"Primarily, this failure has resulted from the absence of effective means of challenging the legality of police searches. Suppose the police search a person's house illegally without finding any evidence upon which to base a criminal prosecution. What remedies are open? Clearly a civil suit for damages is available against the officer, possibly against his superior officers, and perhaps even against a surety. But except in outrageous situations where punitive damages may be sought, the possibility of a substantial recovery is slight, and difficulties of collection will normally be present. The victim of the search may also file a complaint seeking to invoke disciplinary action against, or criminal prosecution of, the offending officer. Here again relief is unlikely except in extreme cases involving violence, brutality, or blackmail. No action can be expected if the policeman's action has been pursuant to departmental policy.

"If the illegal search does result in the seizure of evidence of a crime, the person involved will find the possibilities of a substantial recovery in a civil suit or of securing disciplinary action against the officer even more remote. . . ."

Barrett, *Exclusion of Evidence Obtained by Illegal Searches—a Comment on People* v. *Cahan*, 43 Calif. L.R. 565, 568-569 (1955)

"Perhaps more important even than the vagueness of the rules is the fact that prior to the *Cahan* decision the police were under no substantial pressure to seek clarification of those rules. The issue of legality became crucial so seldom that the police had, in effect, broad discretion in determining the procedures to follow, subject only to community pressures, particularly those by the press, which rarely focused upon any but the most obvious abuses. Some law enforcement officials took advantage of the paucity of precedents to justify common police practices as being reasonable under the circumstances and, hence, not within the constitutional ban of 'unreasonable' searches and seizures. . . .

"Clearly, it is undesirable to leave the determination of the reasonableness of police procedures within the almost unchecked discretion of law enforcement officials who generally tend to value the necessities of law enforcement above the claims of individual liberty. It is no answer to say, as does the Los Angeles chief of police:

"'An experienced and trained officer does not waste his time with indiscriminate or random searches or other quests for evidence, nor is he eager to incur the wrath of his superiors and of the public, or the imposition of departmental discipline, or civil liability, by searches which are irrelevant to his duty or which have no reasonable promise of furthering the execution of his duty.'

"Nor is it an answer to say more bluntly that the police 'do not go about breaking into homes of innocent persons to search them or install microphones for they have more to do than meddle in such a matter. The governing rules must be fashioned by the community generally if a fair compromise is to be made of the claims of law enforcement and of individual liberty. And if the rules are to be effective in controlling police activity, compliance with them must be judicially enforceable.

"Hence, when the Cahan case came to the court, California was badly in need of (1) a re-examination and definition of the rules governing police searches and seizures, and (2) developing more effective remedies for police violations of the rules. . . . "

43 Cal, L. Rev. 577-578

2. Effect of the California Exclusionary Rule

Needless to say, California's adoption of the exclusionary rule was initially criticized by some of the state's law enforcement officers. However, experience with the rule demonstrated that its effects were actually beneficial. Thus, the State Attorney General, who originally opposed the adoption of the exclusionary rule, subsequently acknowledged that its overall effects had been beneficial. His conclusion is worthy of note (quoted at 9 Stanford L. Rev. 538):

"The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice."

Professor Barrett gives a more detailed account of the benefits resulting from California's adoption of the exclusionary rule (*op. cit.*, 43 Cal. L. Rev. 586-588):

"The main thrust of the exclusionary rule is against the police department which is trying to do its job of crime control but is overzealous in its methods. The principal long-run benefit to be expected from the rule is that it will force the administrators of such departments to discipline their forces to be more careful to abide by the rules. It is reasonable to assume that a police chief may forbid the use of dictographs if the evidence so secured cannot be used in court; that he may try to make the search warrant procedure work in narcotics and gambling cases if the result of just breaking in and seizing evidence will be the acquittal of the suspects. The conscientious police chief will no longer be able to rely on his own judgment as to the necessities of law enforcement; he will be forced to consider carefully judicial interpretations of the rules governing searches and seizures, and to do his best to secure com-

pliance with those rules by the individual policeman under his command. For the first time in California, the rules governing search and seizure will be crucial to those police administrators whose goal is to produce 'conviction hazards' so great that criminal operations become unprofitable.

"In the short run there is even more to be said for the Cahan decision. As has been pointed out above, the California situation was most unsatisfactory. The rules were ill-defined. There was little direct pressure upon the police to conform to the rules. In practice, police discretion in determining the reasonableness of searches was rarely subject to check. The possibilities of the situation improving appeared slight. Law enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative to force the police to come before the legislature. Hence, the record in California could fairly be read as suggesting that only the adoption of the exclusionary rule by the court would force a clarification, judicially or legislatively, of the applicable rules, and provide a mechanism for their enforcement. That the majority of the court in the Cahan case so read the record is shown by the assertion that experience had shown the ineffectiveness of direct remedies in suppressing illegal searches and seizures, by the reference to the difficulty of arousing public opinion in opposition to illegal activities of this type, and by the conclusion that, as a result, there is 'all the more necessity for courts to be vigilant in protecting these constitutional rights if they are to be protected at all.' It should be noted, however, that this argument for judicial adoption of the exclusionary rule as the only means of bringing public attention to focus upon the illegal search problem is not necessarily an argument for the desirability of the rule as a permanent matter—a full scale legislative consideration of the problem might end up with the elimination of the exclusionary rule. But even should this happen, the decision would have served a useful purpose.

"The experience of the first few months after the Cahan decision indicates that many of the beneficial results suggested above will occur. Law enforcement personnel have

been forced into public discussion of the problems of illegal searches. The California Attorney General has prepared and distributed a pamphlet designed for peace officers as a 'practical guide to the law of arrest, concerning searches and seizures.' He has also appointed a committee to draft proposed legislation covering arrest, search and seizure. Newspaper reports of dismissals of prosecutions suggest that the legality of police action has become an issue of major concern for the courts. And, as noted above, the supreme court has recently taken over a large group of cases for the purpose of giving an early clarification of some of the applicable rules."

APPENDIX C

Constitutional and Statutory Provisions

United States Constitution
Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution
Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution
Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21 *U.S.C.*, Section 174

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years, and in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

California Health and Safety Code Section 11500

"Except as otherwise provided in this division, no person shall possess, transport, import into this State, sell, furnish, administer or give away, or offer to transport, import into this State, sell, furnish, administer, or give away, or attempt to import into this State or transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 18 1959
JAMES R. BROWNING, Clerk

No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOSE TERRONES RIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statute involved	2
Statement	3
Summary of argument	8
Argument	14
I. Introduction	14
II. The action of the state officers in approaching the taxicab and identifying themselves did not invade any rights of petitioner	16
A. Petitioner's liberty was not restrained by the appearance of the officers	18
B. There was adequate justification for any detention that may have been involved	22
1. The limited detention involved in making inquiry is not an arrest; its propriety must be judged by reasonableness under all the circumstances	25
2. The officers had a reasonable basis for inquiry	37
III. If the officers lawfully approached the taxicab, their subsequent seizure of the narcotics and arrest of the petitioner were lawful	40
Conclusion	44

CITATIONS

Federal cases:	
Abbate v. *United States*, 359 U.S. 187	8
Adams v. *New York*, 192 U.S. 585	42
Agnello v. *United States*, 269 U.S. 20	44
Barkus v. *Illinois*, 359 U.S. 121	8
Bell v. *United States*, 254 F. 2d 82, certiorari denied, 358 U.S. 885	41
Bennett v. *United States*, 145 F. 2d 270, certiorari denied, 323 U.S. 788	42

Federal cases—Continued

	Page
Bowles v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, certiorari denied, 325 U.S. 877	42
Bowles v. *Ray*, 146 F. 2d 652, certiorari denied, 325 U.S. 875	42
Boyd v. *United States*, 286 Fed. 930	41
Brady v. *United States*, 148 F. 2d 394	40
Brinegar v. *United States*, 165 F. 2d 512, affirmed, 338 U.S. 160	32, 33, 34
Burton v. *United States*, decided Nov. 16, 1959 (C.A. 9)	27
Carroll v. *United States*, 267 U.S. 132	42, 44
Carter v. *United States*, 231 F. 2d 232, certiorari denied, 351 U.S. 984	27
Draper v. *United States*, 358 U.S. 307	43
Elkins v. *United States*, No. 126; this Term	8, 14
Ellis v. *United States*, 264 F. 2d 372, certiorari denied, 359 U.S. 998	27
Ellison v. *United States*, 206 F. 2d 476	40, 41
Fisher v. *United States*, 205 F. 2d 702, certiorari denied, 346 U.S. 872	41
Fowler v. *United States*, 239 F. 2d 93	35
Gilliam v. *United States*, 189 F. 2d 321	35, 36
Giordenello v. *United States*, 357 U.S. 480	23
Green v. *United States*, 259 F. 2d 180, certiorari denied, 359 U.S. 917	27
Haerr v. *United States*, 240 F. 2d 533	40
Harris v. *United States*, 331 U.S. 145	41
Henry v. *United States*, No. 17, this Term, decided November 23, 1959	10, 22, 23
Hester v. *United States*, 265 U.S. 57	40
Hobson v. *United States*, 226 F. 2d 890	40
Irvine v. *California*, 347 U.S. 128	8
Jenkins v. *United States*, 161 F. 2d 99	30
Jordan v. *United States*, 254 F. 2d 710	35
Kelly v. *United States*, 197 F. 2d 162	42
Lane v. *United States*, 148 F. 2d 816, certiorari denied, 326 U.S. 720	42
Lawn v. *United States*, 355 U.S. 339	8
Lawson v. *United States*, 254 F. 2d 706	35
Lee v. *United States*, 221 F. 2d 29	27, 38–39, 40
Long v. *Ansell*, 69 F. 2d 386	30
Love v. *United States*, 170 F. 2d 32, certiorari denied, 336 U.S. 912	42

Federal cases—Continued — Page

Lustig v. *United States*, 338 U.S. 74 — 7
McCarthy v. *United States*, 264 F. 2d 473 — 34, 35
McQuaid v. *United States*, 198 F. 2d 987, certiorari denied, 344 U.S. 929 — 41
Martin v. *United States*, 155 F. 2d 503 — 40
Mason v. *United States*, 257 F. 2d 359, certiorari denied, 358 U.S. 831 — 40
Mazer v. *Stein*, 347 U.S. 201 — 8
Morgan v. *United States*, 159 F. 2d 85 — 35
Morton v. *United States*, 147 F. 2d 28 — 30
Petteway v. *United States*, 261 F. 2d 53 — 41
Poulas v. *United States*, 95 F. 2d 412 — 27
Safarik v. *United States*, 62 F. 2d 892 — 41
Smith v. *United States*, 2 F. 2d 715 — 41
Smith v. *United States*, 264 F. 2d 469 — 34
Steele v. *United States No. 1*, 267 U.S. 498 — 41, 42
United States v. *Di Re*, 332 U.S. 581 — 16
United States v. *Lee*, 274 U.S. 559 — 41
Weathersbee v. *United States*, 62 F. 2d 822, certiorari denied, 289 U.S. 737 — 27
Weeks v. *United States*, 232 U.S. 383 — 44
Work v. *United States*, 243 F. 2d 660 — 40
Zap v. *United States*, 328 U.S. 624 — 41

State cases:

Baines v. *Brady*, 122 Cal. App. 2d Supp. 957 — 29
Campbell v. *Commonwealth*, 203 Ky. 151 — 28
Gisske v. *Sanders*, 9 Cal. App. 13 — 29
Hargus v. *State*, 58 Okla. Cr. 301 — 28
Johnson v. *State*, 118 Tex. Cr. Rep. 293 — 28
Pena v. *State*, 111 Tex. Cr. Rep. 218 — 28
People v. *Blodgett*, 46 Cal. 2d 114 — 38
People v. *Brown*, 147 Cal. App. 2d 352 — 43
People v. *Gusukuna*, 152 Cal. App. 2d 185 — 43
People v. *Hennemann*, 367 Ill. 151 — 28
People v. *Hood et al.*, 150 Cal. App. 2d 497 — 43
People v. *Jaurequi*, 142 Cal. App. 2d 555 — 28
People v. *Mendoza*, 145 Cal. App. 2d 279 — 43
People v. *Michael*, 45 Cal. 2d 751 — 28
People v. *Perry*, 79 Cal. App. 2d 906 — 38
People v. *Seely*, 66 Cal. App. 2d 408 — 28
People v. *Smith*, 141 Cal. App. 2d 399 — 28

	Page
State Cases—Continued	
People v. *Wickliff*, 144 Cal. App. 2d 207	43
People v. *Woods*, 139 Cal. App. 2d 545, certiorari denied, 352 U.S. 1006	43
State v. *Gulczynski*, 32 Del. 120	27
State v. *Zupan*, 155 Wash. 80	28
Trowbridge v. *Superior Court*, 144 Cal. App. 2d 13	43
English cases:	
Lawrence v. *Hedger*, 3 Taunt. 13	26
Rex v. *Bootie*, 2 Burr. 864	26
Constitution and Statutes:	
United States Constitution:	
Fourth Amendment	2, 10, 11, 22, 29, 30, 42
Fourteenth Amendment	2, 22
21 U.S.C. 174	3
California Health and Safety Code:	
Sec. 11500	6
California Penal Code:	
Sec. 15	38
Sec. 17	38
Sec. 697	38
Sec. 817	38
Sec. 836	2–3, 42
Delaware Code, Title 11, § 1902	27
General Laws of Rhode Island, Title 12, c. 7, § 1	27
Revised Statutes of New Hampshire, c. 594, § 2	27
English statutes:	
Edw. III, c. 14 (1331)	26
19 and 20 Vict., c. 64 (1856)	26
19 and 20 Vict., c. 69 (1856)	26
Miscellaneous:	
Aglion, *Dictionnaire Juridique* (1947)	30
A. L. I., Code of Criminal Procedure, § 18	29
A. L. I., Restatement of Torts, § 112	29
1 Bousquet, *Dictionnaire de Droit* (2d ed. 1847)	30
Cornelius, *The Law of Search and Seizure* (2d ed 1930)	29
Federal Rules of Criminal Procedure, Rule 41 (e)	6
2 Hale, *Pleas of the Crown* (1st Amer. ed. 1847)	26
2 Hawkins, *Pleas of the Crown* (6th ed. 1777)	26
Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201	30
Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315	27

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 52

JOSE FERRONES RIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 166–175) is reported at 256 F. 2d 173. The opinion of the district court denying petitioner's pre-trial motion to inspect the grand jury minutes is reported at 21 F.R.D. 7.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1958 (R. 175). The petition for a writ of certiorari was filed on June 14, 1958, and granted on April 20, 1959 (R. 176; 359 U.S. 965). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions, as limited in the order granting the writ of certiorari (R. 176; 359 U.S. 965), are:

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

At the time of the arrest in this case, the California Penal Code, § 836, provided, in part, as follows:

> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

* * * * *

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.[1]

* * * * * *

5. At night, when there is reasonable cause to believe that he has committed a felony.

STATEMENT

An indictment filed on June 19, 1957, in the United States District Court for the Southern District of California, charged petitioner with unlawful receipt and concealment of more than two ounces of heroin, a narcotic drug, in violation of 21 U.S.C. 174 (R. 1). On July 25, 1957, petitioner was found guilty as charged by a jury (R. 164). He was sentenced to imprisonment for twenty years on August 12, 1957 (R. 165–166). The court of appeals affirmed the conviction (R. 166–175).

The issues in this case relate solely to the seizure by state officers of narcotics dropped on the floor of a public vehicle by petitioner just prior to his arrest. Petitioner moved to suppress the narcotics prior to the federal trial (R. 2). The evidence adduced during the federal proceedings which relates to these issues may be summarized as follows:

At about 10:50 p.m., February 18, 1957, officer D. W. Beckmann and his partner, policewoman Grace, both of whom were plain-clothed members of the Los Angeles, California, police force, observed a

---

[1] Paragraph 3 has since been amended to read:

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

taxicab parked on a parking lot next to an apartment house at the intersection of First and Flower Streets in Los Angeles (R. 6–7, 12, 56–57). It was unusual to see a cab parked in that location and Officer Beckmann had arrested a narcotics dealer who had been using a taxicab in that same locality some three months earlier (R. 10). The vicinity of First and Flower Streets was known by Officer Beckmann to have a bad reputation for narcotics activity (R. 54, 72). In the nine-month period prior to the arrest in this case, Beckmann had made 22 narcotic arrests, most of them in the vicinity of First and Flower Streets (R. 12, 54–55).

After watching the taxicab for about five minutes (R. 7), Beckmann saw the petitioner walk onto the parking lot. Petitioner returned to the sidewalk, looked up and down the street, walked around the parking lot, then came back and got into the cab (R. 14).

As the taxi moved off into traffic, Beckmann and policewoman Grace followed in an unmarked police car (R. 7, 56). When the cab stopped for a red traffic light, officer Beckmann approached the passenger side and identified himself to both the driver and petitioner, who was sitting in the rear seat (R. 7–8, 13). Beckmann held his police badge in his left hand in such a way as to expose it to both the driver and the petitioner, directed the beam of his flashlight on the badge, and announced that he was a police officer (R. 57–58, 64).[2]

[2] It was also shown that the intersection was well lighted, with overhead lamps at all four corners (R. 64).

The officer did not intend to arrest either petitioner or the cab driver when he walked up to the taxicab (even though the driver had gone through a red light while the police were following the cab (R. 7, 13)). He suspected petitioner of narcotics activity, however, and intended to show his identification, hoping that petitioner would attempt to get rid of any narcotics he might have in his possession upon learning that Beckmann was a police officer. "[I]f he had any junk on him he was either going to eat it, throw it, swallow it or stash it" (R. 14).

Beckmann's hopes were realized, for, as he was showing his credentials, petitioner became agitated, withdrew a white object from his jacket pocket, and dropped it on the floor of the vehicle. The officer directed his flashlight beam on the object and saw that it appeared to be a condom filled to a length of approximately five inches with a white powdery substance (R. 7–8, 52–53, 63, 110–111). He knew, as a result of his experience, that this was a container commonly used by narcotics dealers to carry heroin (R. 53–54, 72–73). The officer sought to open the cab door to retrieve the white object; petitioner simultaneously attempted to open and exit through the same door. As petitioner emerged from the taxicab, Beckmann held him and told him he was under arrest on suspicion of a narcotics violation (R. 7–8, 64). While holding petitioner, who was struggling and pulling away, Beckmann told policewoman Grace to retrieve the narcotics (R. 65–66, 77). Coming from the other side of the vehicle where she had stationed herself, the policewoman did so (R. 18–19, 76, 81).

Less than one minute elapsed from the approach of the officers to the moment of arrest (R. 121, 160).[3] Subsequent analysis revealed that the condom contained 60 grams of heroin—enough for from 500 to 1000 doses of narcotics (R. 6, 8–9, 18, 63, 67, 103–104, 161).

It was also shown that no federal officers had taken part in the arrest and seizure, that officer Beckmann had not had any contact with federal agents before or at the time of petitioner's arrest, and that the officer had never had occasion to work with federal officers (R. 50). It was only after an unsuccessful attempt to prosecute petitioner for violations of the state narcotic laws[4] that Beckmann discussed the case with his

---

[3] Petitioner broke away from the officer and fled after being arrested. He disregarded several orders to halt, and, after a footchase of some distance, Beckmann finally had to shoot and wound petitioner to retake him (R. 154–155).

[4] Petitioner had been charged with the state felony of possession of narcotics (California Health and Safety Code, § 11500). The case came on for trial on May 10, 1957, in the Superior Court of the State of California for the County of Los Angeles before Judge Odemar, sitting without a jury. Petitioner immediately moved to suppress the evidence that had been obtained at the time of his arrest. The court, on the basis of the transcript of the preliminary hearing which he had read pursuant to a stipulation of the parties, and with substantially no argument, found that the officers did not have probable cause to believe that petitioner had committed a felony at the time they approached the taxicab, and granted the motion to suppress. The prosecutor, not yet having opened the People's case, then rested, and the court thereupon found petitioner "not guilty as charged" (R. 22–25). Although the substance of the proceeding was not essentially different from a hearing on a pre-trial motion to suppress in the federal practice (see Rule 41(e), F.R. Crim. P.), under the California practice the grant of the motion to suppress resulted in petitioner's acquittal.

superiors and suggested giving the evidence to the federal authorities (R. 50–51, 71–72). Beckmann then went to the federal narcotics representatives and gave them a full statement concerning the incident (R. 70–72).

The federal district court, finding the facts substantially as set out above, overruled petitioner's motion to suppress, holding that no arrest was made until petitioner emerged from the taxicab and that there was then probable cause to justify an arrest without warrant and the subsequent seizure; that, in any event, there was no actual search because the petitioner had abandoned the narcotics in a public vehicle; and that, finally, there had been no federal participation in the incident (R. 98–101). The court of appeals affirmed the conviction, holding that the district court's "uncontested finding and conclusion that the seizure was legal" warranted its denial of the motion to suppress. The court also held that, even if it was assumed that the seizure was illegal, the evidence was nevertheless admissible in the federal trial under the "silver platter" doctrine of *Lustig* v. *United States*, 338 U.S. 74, 78. The court held that that doctrine, under which evidence is admissible in the federal courts if there has been no federal participation in the seizure, was applicable even though a state court had previously determined that the seizure was illegal and the defendant had been acquitted in the state proceeding (R. 170–171).[5]

[5] See note 4, *supra*. Petitioner did not argue in the court of appeals that the seizure was unlawful on the facts of the case (R. 168), nor did he make that contention either in his petition for certiorari or in his reply to the government's memorandum.

SUMMARY OF ARGUMENT

I

The courts below held both that the evidence was lawfully seized by the state officers and that, even if not, it would nevertheless be admissible under the "silver platter" doctrine. Our argument on the second issue is developed in our brief in *Elkins* v. *United States*, No. 126, which is to be argued with this case, and this brief will be limited to the question whether the seizure by the state officers was lawful.

Petitioner contends that his arrest occurred at the moment the officers approached the cab and identified themselves to him and that this "arrest" was illegal because they did not, at that time, have probable cause to believe that he had committed a felony. Our position is, as the district court held, that the arrest did not occur until petitioner emerged from the taxicab and that by that time the intervening events had given the officers more than ample cause so to believe.

II

The action of the officers precipitating petitioner's disclosure of the narcotics in his possession consisted

---

Instead, petitioner contended only that the federal court was bound by the state court's conclusion that the seizure was illegal (R. 168–169; Pet. 14–15), also raising an issue of double jeopardy similar to that decided in *Abbate* v. *United States*, 359 U.S. 187, and *Bartkus* v. *Illinois*, 359 U.S. 121. The question of the binding effect of the state court's ruling, which the government treated as a question of *res judicata* in its memorandum (pp. 8–10), has been foreclosed by the limited grant of certiorari. Nevertheless, petitioner in his brief on the merits (pp. 15–16, 28) again attempts to raise that issue. That he cannot do. *Irvine* v. *California*, 347 U.S. 128, 129–130; *Mazer* v. *Stein*, 347 U.S. 201, 208; see *Lawn* v. *United States*, 355 U.S. 339, 362 fn. 16.

of nothing more than walking up to the taxicab in which petitioner was riding, while it was standing at a stop light, and identifying themselves as police officers. The lawfulness of that action must be determined independently of the events that subsequently transpired or of the fact that petitioner, because of his guilty knowledge, was misled by that action to believe that his crime had been discovered and thereby induced to betray himself. If the action would not have violated the rights of an innocent person who, not reacting as petitioner did, was allowed to proceed on his way, it did not violate petitioner's rights.

A. Our primary contention is that, in simply approaching the stationary taxicab and identifying themselves, the officers did not place petitioner under any restraint. They neither stopped the taxicab, touched petitioner, nor said anything that could be construed as an assertion of power to detain petitioner against his will. Nor would there have been a restraint if petitioner had not betrayed himself and the officers had proceeded to ask questions about his suspicious behavior. No more than anyone else does an officer require a legally-sufficient justification to ask a question, and he may properly investigate his suspicions, however unfounded they may prove to be, by directly questioning the suspect. The mere asking of a question, in short, is not itself a restriction of liberty. Nor is it made so by the possible anticipation of the person questioned that *if* he attempts to leave he will *then* be restrained. What the officers may have intended to do if certain events that did not

transpire had actually transpired is irrelevant; the only issue is whether what they in fact did was lawful. Here, all the officers did was approach the stopped car and identify themselves, and that action by itself did not restrain petitioner's freedom and was entirely lawful.

B. We contend in the alternative that, even if the very approach of the officers is thought to have restrained petitioner's freedom of movement, the temporary detention involved did not constitute an arrest, was adequately justified by petitioner's suspicious behavior, and hence was not "unreasonable" within the meaning of the Fourth Amendment. We do not believe that the Court, by its brief comments on a related question in *Henry* v. *United States*, No. 17, this Term, intended to foreclose further consideration of the problem when presented to the Court with full argument, and accordingly we approach the question as one yet to be fully developed and considered.

1. The questioning of persons suspected of criminal activities or likely to have knowledge of them is a necessary and proper part of law enforcement, and in our view police officers may properly, if reasonable under the circumstances, detain persons for a limited time for that purpose. The reasonableness of a particular detention depends of course upon all the circumstances, but the propriety of such action in some circumstances seems evident—for example, establishing a roadblock in the vicinity of a kidnapping, or holding persons who have witnessed a murder until the investigator has had an opportunity to question them.

And since ancient times it has been recognized that reasonable suspicion not amounting to "probable cause" is a proper basis upon which to stop a pedestrian for a limited time and ask questions. A person in a vehicle is in no different position, and the need for a power to impose a temporary restraint on such persons may be even greater. In the case of a pedestrian, it may be possible to ask a question without restricting his movement, but in the case of a moving vehicle it is necessary to stop the vehicle before the occupant can even be approached.

Such a limited detention for purposes of inquiry is not an "arrest" as that term is understood at common law—a taking into custody to hold to answer for a crime—and the common law requirement of "probable cause" for an arrest which is implicit in the Fourth Amendment is not in terms applicable. The true inquiry is not whether there was probable cause as such but only whether, under all the circumstances, the detention amounts to an "unreasonable" seizure of the person within the meaning of the Fourth Amendment.

Being stopped by a police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupant, had the police been able to ask him questions, could readily have explained

as being entirely innocent. In a fair balancing of the interests at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary.

2. The action of the officers in this case was reasonable under the circumstances. They did not stop the taxicab or intend to restrain petitioner in any way. Their purpose was simply to identify themselves to petitioner in the hope, which was realized, that if he did have narcotics he would reveal himself by attempting to get rid of them. If that action was an impairment of petitioner's liberty, it was an impairment of a most limited sort which was fully justified by the facts then known to the officers. Petitioner had boarded the taxicab in an area noted for illicit narcotics activity and had carefully surveyed the street and reconnoitered the parking lot before entering the vehicle. The waiting taxicab was itself parked at an unusual place. While we do not contend that those observations gave the officers probable cause to believe that petitioner was committing a felony, they did arouse in the officers a reasonable suspicion and give them cause to investigate further and to take the limited action that they did to confirm or dissipate their suspicions.

III

If we are correct in our view that the action of the officers in approaching the taxicab and identifying themselves was not itself unlawful, their subsequent arrest of petitioner and seizure of the narcotics were fully justified by the intervening events. Immediately after the officers identified themselves, petitioner, presumably believing that he had been detected, removed a white object from his pocket, dropped it to the floor, and attempted to get out of the vehicle. That action—precisely the course of events anticipated by the officers if petitioner did in fact have narcotics in his possession—by itself gave the officers probable cause to believe that the object contained narcotics and that petitioner was therefore guilty of a felony. When the officer turned the beam of his flashlight on the discarded object and saw it to be a condom—an article known by him to be commonly used to carry narcotics—filled with a whitish powder, probable cause ripened almost into a certainty. And it was only then that the officers arrested petitioner and recovered the narcotics from the floor of the taxicab.

At that point, it cannot be doubted that the officers, having seen what was unmistakably narcotics in petitioner's possession, had adequate grounds to arrest petitioner, and accordingly the seizure of the narcotics can be justified as incident to a lawful arrest. Logically, however, the propriety of the seizure does not depend upon the arrest, and it can be independently

sustained on the ground that petitioner had abandoned the property and that, since it was contraband, the officers were entitled to seize it without warrant when they came upon it in the course of their lawful activities.

ARGUMENT

I

INTRODUCTION

Whether the heroin taken from the floor of the taxicab by the state officers was properly admitted into evidence turns first upon whether the heroin was lawfully seized by the state officers and, second, whether, even if illegally seized by them, it could nevertheless be used in a federal trial. Our argument on the second issue, the so-called "silver-platter doctrine" question, is developed at length in our brief in *Elkins* v. *United States*, No. 126, this Term—set for argument immediately preceding this case—and will not be repeated here. The argument in this brief will be limited to the first question, namely, whether the seizure by the state officers was lawful.

Petitioner's argument that the seizure was unlawful is based entirely on the contention that the state officers did not have probable cause to believe that petitioner had committed a felony when they first approached the taxicab. That assumes, contrary to the holdings below, that such action of the officers constituted an arrest. Petitioner would have the Court ignore the significance of the events intervening

between the officers' approach to the taxicab and the actual arrest and seizure.[6]

The events immediately preceding the seizure may be divided into four steps:

(1) While the taxicab in which petitioner was riding was standing at a stop light, officer Beckmann walked to the side of the car, cast his flashlight on his badge, and said that he was a police officer.

(2) Petitioner withdrew from his pocket and dropped on the floor a white object which to the officer (shining his flashlight on it) appeared to be a heroin-filled condom, opened the door, and attempted to take flight.

(3) Officer Beckmann physically restrained petitioner as he emerged from the taxicab and told him he was under arrest.

(4) Officer Grace picked up the condom from the floor of the taxicab.

The controlling question, with which we will first deal (Point II), is whether the action taken at step 1—the appearance and identification of the officers—in and of itself infringed any rights of petitioner guaranteed by the Fourth and Fourteenth Amendments. If it did not, the subsequent events disclosing the contraband and giving cause to believe that petitioner was committing a felony fully justitfied the final seizure of the narcotics (Point III). In the

---

[6] The Superior Court for the County of Los Angeles appears to have made the same error, granting the motion to suppress the evidence in the state proceedings solely on the ground that the officers did not have probable cause for an arrest when they first approached the taxicab (R. 24).

first place, being lawfully present at the side of the taxicab (step 1) and thereupon seeing narcotics dropped to the floor (step 2), the officers were entitled to seize the narcotics as contraband (step 4) without regard to the intervening arrest (step 3) or its legality—that is, the seizure would have been lawful even if the officers had not arrested petitioner but had permitted him to depart. Alternatively, if the arrest is significant, the events occurring at step 2 gave the officers probable cause to believe that petitioner was committing a felony, made the arrest (step 3) lawful, and thus justified the seizure (step 4) as one incident to a lawful arrest.

II

THE ACTION OF THE STATE OFFICERS IN APPROACHING THE TAXICAB AND IDENTIFYING THEMSELVES DID NOT INVADE ANY RIGHTS OF PETITIONER.

The question whether the appearance and identification of the officers in itself infringed any rights of petitioner must be answered independently of the events that subsequently transpired. As petitioner correctly observes (Br. 24–25), police action "is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success" (*United States* v. *Di Re*, 332 U.S. 581, 595). By the same token, however, it is not to be made illegal by what it turns up. Thus the question here is the same as it would be if, for example, instead of taking the precipitous action that he did, petitioner had waited to see what the officers

wanted, the officers had asked him if he would answer some questions, he had declined to do so, and the officers, having no basis to hold him, had then departed.

Similarly, the action is not to be appraised in terms of the effects it might have on a person who, being then engaged in the commission of a felony, is led to believe by the officers' appearance that he has been discovered. While the guilty are entitled to invoke the same constitutional protections as the innocent, they are not, because they are guilty, entitled to be free of police action that would not invade the rights of an innocent person. The unexpected appearance of a police officer before a person who has 60 grams of heroin in his pocket may have a drastic impact upon his sense of well-being and cause him to take some self-betraying action. And the hope that his official appearance would have that effect was, in fact, the very reason given by Officer Beckmann for making his appearance: "if he had any junk on him he was either going to eat it, throw it, swallow it, or stash it" (R. 14). But that effect the action has only because of the guilt of the suspect and his fear that he has been discovered; it does not place the guilty man in a preferred position. In our view, the only relevant consideration is the probable effect of the police action upon an innocent person.

In short, the question in this case is the same as it would be if petitioner had been innocent of any wrong-doing and, after either answering or declining to answer any questions, had proceeded on his way.

In such a case, could petitioner have maintained an action for damages, even nominal, for a violation of his constitutional rights? When the question is so viewed, its insubstantiality becomes apparent. As we shall show, the initial action of the officers in approaching the taxicab did not by itself restrict petitioner's freedom in any way and hence no question of justification for the action need be reached. Alternatively, we shall show that, even if the action did restrain petitioner's liberty in some way, there was adequate justification for any temporary detention that may be thought to be involved.

A. PETITIONER'S LIBERTY WAS NOT RESTRAINED BY THE APPEARANCE OF THE OFFICERS

1. Prior to the time of petitioner's panicked self-disclosure, the officers had taken no action which impeded petitioner's progress or placed him under restraint. They did not stop the taxicab; it was then standing at a stop light.[7] They did not touch petitioner, the cab driver, or even the taxicab, and said nothing to petitioner that could be construed as the assertion of a power to detain him against his will. What they did, and all that they did, was walk on a public street to the side of the cab and there announce that they were police officers. Patently, petitioner had no right to exclude police officers (or anyone) from any place on the public streets and he

[7] There is no evidence that the light had turned green before the crucial events had transpired, and such evidence as there is indicates that it is likely that it had not. See R. 70–71, 121, 142.

can hardly contend that the officers' identification of themselves constituted an assault or imprisonment.

There was no more a restraint of liberty here than there is when a uniformed police officer approaches a pedestrian standing on a street corner and, identification being unnecessary, addresses him, or when a policeman knocks at the door of a home and, upon the occupant's opening the door, identifies himself. And if such action is not otherwise a restraint of liberty, it is not made so because the person approached has a state of mind that causes him to be stampeded into self-betrayal by the very appearance of the policeman, or because the officer anticipates that result and takes the action for that very purpose. To say that it is, we submit, would be to construct a rule designed, not to protect the guilty and the innocent alike, but specifically to protect the guilty against action that would not impinge upon either the sensibilities or the rights of an innocent person.

2. In this case, petitioner's indiscreet action of dropping the narcotics was prompted by the very appearance and identification of the officers, and it is upon that that he must stand to show a violation of his rights. In our view, however, there would equally not have been a restriction of petitioner's liberty if he had retained his composure to see what the officers wanted, and the officers had then asked him questions about his activities. However insubstantial, or even irrational, the reasons for his suspicions, a police officer may properly approach a suspect, even at his home, explain his suspicions, and ask

him questions about his actions—the suspect, of course, being equally free to exclude the officer from his home or to refuse to answer the questions. The point is that the mere asking of a question is in no sense a restriction of liberty. No more than any other person does a police officer require a legally sufficient justification to ask a question, and he may do so at any time or at any place that a private person would be privileged to do so.

3. Petitioner may say that as a practical matter he was not free, when the officers approached, to tell the cab driver to drive on when the light changed or to leave the cab and walk away, and that if he had attempted to do so the officers would have stopped him. In the first place, there is no evidence in the record that the officers had that intention. To the contrary, Beckmann's testimony was that he had no intention of detaining petitioner and that his only purpose was to confront him in the hope that he would, as he did, give himself away (R. 14). More than that, however, we think the intention of the officers in that sense—what they might have done had different events occurred—is sheer speculation and irrelevant, and the only significant question is whether what they in fact did was lawful. If petitioner, without disclosing the narcotics, had attempted to leave and the officers had detained him, he would have been in a position to challenge *that* detention; but those events did not happen and in fact the officers made no assertion, prior to petitioner's self-betrayal, of either force or authority to detain him. There was therefore no

actual restriction of his freedom of which he can possibly complain.

It may be true that one approached by a police officer may be uncertain, or even apprehensive, about what the officer is going to do, and may anticipate that he will be stopped if he leaves, but his uncertainty does not by itself mean that he is at present being restrained. A customer asked by a shopkeeper whether he had paid for an article he is taking out of the store may be uncertain whether the shopkeeper will forcibly detain him if he refuses to answer, but he cannot for that reason alone sue the shopkeeper for false imprisonment. The suggestion, moreover, would prove too much, for it would mean that every person approached by a policeman has been restrained of his liberty unless he knew in advance what the officer was going to do. If the person approached wishes to assert his right to leave, he can do so either by asking the officer if he is being held or by attempting to leave. Some persons unfamiliar with their rights may perhaps be intimidated and not attempt to leave when they wish to do so, but it is surely unnecessary to forbid legitimate inquiries in order to avoid the possibility that some individual may fail to assert his rights or be apprehensive that, if he does, the police may then do something unlawful.

In sum, it is our primary position that the action of the officers in approaching the stopped taxicab on a public street and identifying themselves to petitioner was, by itself, entirely lawful and did not in any way restrain petitioner's liberty. That the mere sight of

the officers was enough to make petitioner think that his activities had been discovered and cause him to take the precipitous action that betrayed him did not make unlawful the police actions which were otherwise wholly lawful. And since there was no detention of petitioner, it is irrelevant whether there was a showing of a justification—of probable cause or something less—sufficient to legalize a detention.

B. THERE WAS ADEQUATE JUSTIFICATION FOR ANY DETENTION THAT MAY HAVE BEEN INVOLVED

Alternatively, we contend that, even if it be thought that the approach of the officers operated to restrain petitioner's freedom of movement and hence constituted a temporary detention, petitioner's prior suspicious behavior was sufficient to warrant the officers to take the action they did to investigate their suspicions—*i.e.*, to detain petitioner for a limited period for purposes of inquiry. Our secondary position, in other words, is that even if there was a detention, it was, under all the circumstances, not an "unreasonable" one within the meaning of the Fourth Amendment and hence not a violation of due process under the Fourteenth.

It is this question—whether a limited detention for purposes of inquiry may, in some circumstances, be made on less than probable cause—that was latent, but not argued by the Government, in *Henry* v. *United States*, No. 17, this Term, decided November 23, 1959. As explained in the Government's brief in that case, the Government did not rely on that theory because a

concession had been made in the lower courts and repeated in the brief in opposition to certiorari that an arrest occurred when the agents first stopped the car and that the sole issue was whether the agents then had probable cause to believe that a federal crime was being committed. Whether or not that concession was technically binding on the Government in that particular case, it was deemed inappropriate to raise in this Court, for the first time on the merits, an argument not only not raised but expressly disavowed in the lower courts and in the opposition to the petition for certiorari. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 487–488.

In its opinion in the *Henry* case, the Court, after noting the Government's concession, went on to say (slip op., p. 5):

> That is our view *on the facts of this particular case*. When the officers interrupted the two men and restricted their liberty of movement, the arrest, *for purposes of this case*, was complete. [Emphasis added.]

In view of the Government's failure to argue the question, the fact that the Court did not develop the point in its opinion, and the Court's emphasis that it was so holding only "for purposes of this case" and "on the facts of this particular case," we do not believe that the brief comments quoted above were intended to foreclose a fuller consideration of the question when, in an appropriate case, it was presented to the Court with full argument, or to hold that an automobile can never be stopped for purposes of inquiry

unless the officers are then possessed of probable cause to believe that an offense is being or has been committed. We shall, accordingly, approach the question as one yet to be fully developed and considered by the Court.

Our position is generally that investigation is a legitimate and necessary part of law enforcement; that a police officer may stop a person for the purpose of inquiry on less information than would constitute probable cause for his arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest. We think further that this is as true of a passenger or driver in a vehicle as it is of a person walking in the street, except to the extent that, in judging the reasonableness of the officer's action, one factor to be considered is the manner in which the vehicle is stopped. Where, as here, the vehicle is at a standstill, an officer may as legitimately approach and detain the occupants to make inquiry as he could a pedestrian, even though that same basis might not be sufficient to justify forcing a moving vehicle to the curb with a police car or, at a further extreme, shooting at the tires of a vehicle to force it to stop. In short, we think that police officers have a right to make *reasonable* inquiry even though some restriction of movement is involved; that the issue of whether the inquiry is reasonable is to be determined under all the circumstances; and that here the inquiry was reasonable.

1. *The limited detention involved in making inquiry is not an arrest; its propriety must be judged by reasonableness under all the circumstances*

a. Inquiry and investigation are a necessary part of law enforcement. It has never seriously been questioned that police officers have the right to detain momentarily for questioning individuals who, either by their own fault or by the web of circumstance, have been brought into the field of legitimate police inquiry. Thus, persons present at the scene of a murder could legitimately be detained for a short time for questioning about what they had seen, and asked to give their names and addresses, whether or not there was basis for suspicion that any of them had any part in the crime. Any person so questioned could, of course, refuse to answer, but that does not affect the duty and right of the officers to make inquiry.

The extent to which this right of detention exists, both as to time and place, must necessarily depend upon the varying circumstances of the particular case. As to investigation of completed crimes, the seriousness of the offense, the proximity to or remoteness from the scene of the crime, the amount of time which had elapsed, the suspicious circumstances involved, would all have to be weighed. As to suspicion that a crime has been or is about to be committed, all the factors giving rise to suspicion would have to be considered in relation to the nature of the detention. And one of those factors historically has always been

the time of day or night in which a person has been observed behaving in a suspicious manner.

Since ancient times English courts have held that law enforcement officers may on suspicion, not amounting to probable cause, properly detain a pedestrian for a time and ask questions. "Yet it is holden by * * * some, That any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation." 2 Hawkins, *Pleas of the Crown* (6th ed. 1777), c. 12, § 20, p. 122. While Hawkins suggests that there was dispute about the right of private persons to detain in this manner, there was no question in the case of early law enforcement officials. Hawkins continues (*supra*, c. 13, § 5, p. 129):

> As to the power of watchmen, it is farther enacted by the said statute of Winchester, c. 4. "That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; * * *."

Sir Matthew Hale writes that constables had equal powers to detain for a limited time on suspicion. 2 Hale, *Pleas of the Crown* (1st Amer. ed. 1847), 89, 96–97; see Edw. III., c. 14 (1331), repealed by 19 and 20 Vict., c. 64 (1856), when the compulsory county constabulary act was passed, 19 and 20 Vict., c. 69. See also *Lawrence* v. *Hedger*, 3 Taunt. 13, 15 ("in the night * * * it is highly necessary that they [the watchmen] should have such a power of detention. * * * There was abundant ground of suspicion here."); and *Rex* v. *Bootie*, 2 Burr. 864, 867.

No such question of overnight detention on suspicion alone is involved here. The point of the matter is that the law has long recognized that a peace officer is entitled to take steps to confirm or dissipate his reasonable suspicions; he must ask questions to resolve his doubts; and the best and most logical person of whom he should make inquiry is the person he suspects.

While the basis for a temporary detention has been imperfectly articulated, American courts, both federal[9] and state,[10] are agreed that the right to

[8] States which by statute have authorized temporary detention for questioning without arrest have placed a flat time limit on such detention. Revised Statutes of New Hampshire, c. 594, § 2 (4 hours); General Laws of Rhode Island, Title 12, c. 7, § 1 (2 hours); Delaware Code, Title 11, § 1902 (2 hours). Section 2 of the Uniform Arrest Act, reprinted in full in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343–347, would authorize a police officer to stop and question "any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime," and to detain for as much as two hours anyone so questioned who "fails to identify himself or explain his actions to the satisfaction of the officer."

[9] *Green* v. *United States*, 259 F. 2d 180, 181 (C.A. D.C.), certiorari denied, 359 U.S. 917; *Lee* v. *United States*, 221 F. 2d 29, 30 (C.A. D.C.); *Poulas* v. *United States*, 95 F. 2d 412, 413 (C.A. 9); *Weathersbee* v. *United States*, 62 F. 2d 822 (C.A. 5), certiorari denied, 289 U.S. 737; see *Carter* v. *United States*, 231 F. 2d 232, 235 (C.A. 5), certiorari denied, 351 U.S. 984; *Ellis* v. *United States*, 264 F. 2d 372, 374 (C.A. D.C.), certiorari denied, 359 U.S. 998; see *Burton* v. *United States* (C.A. 9), decided November 16, 1959.

[10] *State* v. *Gulczynski*, 32 Del. 120, 123, 120 Atl. 88, 89 (officer walked up to defendant on the street and asked him what he

make inquiry on suspicion exists, and that it is inherent in the very nature of the investigative process. This has been the ruling of the courts of California, whose rulings would normally govern the conduct of the California police involved in this case. Although "[t]here is no statute prescribing the exact manner in which enforcement officers shall investigate the activities of a suspect" (*People* v. *Seely*, 66 Cal. App. 2d 408, 152 P. 2d 454, 456), the California courts have long held that a proper method of investigation is to ask questions of a prospective witness (*People* v. *Smith*, 141 Cal. App. 2d 399, 296 P. 2d 913, 914), or a suspect (*People* v. *Michael*, 45 Cal. 2d 751, 290 P. 2d 852, 854; *People* v. *Jaurequi*, 142 Cal. App. 2d 555, 298 P. 2d 896, 899), and that an officer may stop a pedestrian on suspicion (not amounting to probable

---

had in the package he was carrying); *People* v. *Hennemann*, 367 Ill. 151, 10 N.E. 2d 649, 650 (officers were informed that there were suspicious-looking persons sitting in an automobile; "That the officers had a right to stop and question plaintiff in error cannot be doubted * * *."); *Campbell* v. *Commonwealth*, 203 Ky. 151, 261 S.W. 1107, 1108 ("their frank admission of their possession of the whiskey, made in response to the inquiry of the officer, alone justified their arrest by the latter * * *."); *Hargus* v. *State*, 58 Okla. Cr. 301, 54 P. 2d 211, 214 ("it is not unlawful for a peace officer * * * to make a reasonable inquiry of strangers or others * * *."); *Johnson* v. *State*, 118 Tex. Cr. Rep. 293, 42 S.W. 2d 421 (officers drove up alongside a person walking on the street and questioned him); *Pena* v. *State*, 111 Tex. Cr. Rep. 218, 12 S.W. 2d 1015, 1016 ("the officer * * * [properly] followed appellant down the railroad track and inquired what was in the suitcase."); *State* v. *Zupan*, 155 Wash. 80, 283 Pac. 671, 674 ("Under the [suspicious] circumstances, it was not an infringement of appellant's constitutional rights to accost him and inquire as to his business.").

cause) to make those inquiries (*Gisske* v. *Sanders*, 9 Cal. App. 13, 98 Pac. 43, 45) even though there is not a right to make an arrest at that moment (*Baines* v. *Brady*, 122 Cal. App. 2d Supp. 957, 265 P. 2d 194, 196–197). "A police officer has a right to make inquiry in a proper manner [on suspicion] of anyone upon the public streets." *Gisske* v. *Sanders*, *supra*.

b. The Fourth Amendment does not require "probable cause" for the limited detention that may be involved in stopping a person for brief questioning in the course of investigation. In terms, the Fourth Amendment forbids only "unreasonable" searches and seizures. The standard of probable cause as the test of reasonableness for an arrest is not explicit but was evolved from the common law of arrest and from the implications of the Fourth Amendment's prohibition of warrants not supported by probable cause. Both that prohibition and the common law requirement of probable cause for arrest were concerned, however, only with a "seizure" of the person of a nature implied by the term "arrest" as that was understood at common law—*i.e.*, the taking of a person into custody for an indefinite period to hold him to answer for a crime.[11] As we have seen, the com-

[11] American Law Institute, Code of Criminal Procedure, § 18:

> Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense.

American Law Institute, Restatement of Torts, § 112:

> An arrest is the taking of another into the custody * * * for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law.

See also, Cornelius, *The Law of Search and Seizure* (2d ed. 1930),

mon law recognized a distinction between temporary detentions for inquiry and an "arrest" for a crime, and probable cause was required only for the latter. Similarly, we think, the "warrant" required by the Fourth Amendment to be supported by probable cause was the traditional warrant of arrest, and hence that provision carries no implication that probable cause is required for limited detentions for inquiry that are less than a common law arrest. Accordingly, we submit that in cases of such limited detentions not amounting to an arrest at common law the only question is whether the temporary restraint on liberty incident to investigation is "unreasonable" within the spirit of the Fourth Amendment. That is, the "probable cause" standard of reasonableness governing arrests is not controlling, and the true inquiry is simply whether, under all the circumstances, the action of the officers in stopping or detaining persons is reasonable.

A distinction between the requirements for an arrest and for a temporary detention for purposes of inquiry is, moreover, a necessary one if law en-

---

sec. 47, p. 156; Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201; *Long* v. *Ansell*, 69 F. 2d 386, 389 (C.A. D.C.); *Morton* v. *United States*, 147 F. 2d 28, 30, fn. 7 (C.A. D.C.); *Jenkins* v. *United States*, 161 F. 2d 99, 101 (C.A. 10).

There is no significance in the derivation of arrest from the French "arrêter," to stop. The French have almost the same word as we have for arrest—"arrestation"—with virtually the same meaning that an individual is taken into official custody in order to answer for an offense. 1 Bousquet, *Dictionnaire de Droit* (2d ed., 1847) 143; Aglion, *Dictionnaire Juridique* (1947) 41.

forcement is not to be unduly hampered. Crime is neither detected nor solved without investigation, and inquiry of persons who may have relevant knowledge is an essential part of investigation. The burden imposed on individuals by being stopped or detained for a short period—on a reasonable basis—so that investigating officers may have an opportunity to question them is, we believe, slight in comparison to the interest of society in crime prevention and detection.

The importance of promptly questioning a possible suspect does not lie primarily in obtaining incriminatory evidence against him. It is perhaps even more important as a means of dissipating suspicions and releasing the officers from further fruitless investigation. In this case, for example, the actions of petitioner observed by the police, while giving them good cause to investigate, were no more than suspicious, and if petitioner was in fact innocent a few questions by the police officers might well have been enough to dispel their doubts. The result of forbidding the officers to ask those questions would be to force them either to abandon the investigation or to spend perhaps fruitless hours investigating a suspicion that could have been immediately quelled by petitioner. Since the suspect always has the right, if he chooses, not to answer any questions, we think that his interest in being free from being stopped to permit the officers to ask the questions does not involve such fundamental rights as to require the police to

abandon a direct and efficient way of determining at least whether there is need for further investigation.

The fact that an automobile rather than a person walking in the street may be involved is a factor to be considered in determining the reasonableness of the inquiry, but it does not change the essential character of the action of the officers in making the inquiry. A person in an automobile may as reasonably be the object of suspicion as a person in the street, and the need for inquiry may be even greater because of the mobility of the automobile. To the extent that the stopping of a moving vehicle presents elements of greater danger than the stopping of a pedestrian in the street, the nature of the detention may properly be considered in relation to the factors justifying inquiry. Thus, a person in a parked car, who acts suspiciously, may be subject to inquiry just as a passer-by would be subject to inquiry. A car at a standstill for a red light, as in this case, is in the same position. On the other hand, something more might be required for the kind of forcible stopping involved in shooting at tires, or crowding a speeding automobile off the road as in *Brinegar* v. *United States*, 338 U.S. 160. But, even so, the stopping for inquiry is not an arrest and may, if reasonable under all the circumstances, be based on less than would be necessary to justify taking a driver or passenger into custody for the purpose of charging him with a crime.

c. The suggestion of Mr. Justice Jackson in *Brinegar* that it would be justifiable to throw up a roadblock and stop all cars where a kidnapping had taken

place in the immediate vicinity [12] affords an example of the reasonableness of and need for a power to detain persons momentarily on something less than probable cause, for it could scarcely be said that anything approaching "probable cause", as it is understood in connection with the law of arrest, exists as to each and all of the cars passing that way. Nor would the apparently innocent presence of individuals near the scene of a serious crime, such as murder, seem to fit any concept, however loose, of probable cause. Yet it can hardly be questioned that it is often reasonable to detain such persons temporarily for questioning.

The majority of this Court in *Brinegar* v. *United States*, 338 U.S. 160, found it unnecessary to reach the question of the right of officers to stop a vehicle for questioning on facts insufficient to constitute probable cause to arrest, since the Court found that the

[12] *Brinegar* v. *United States*, 338 U.S. at 182, 183 (dissenting opinion):

> Undoubtedly the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

facts initially known were sufficient, in themselves, to constitute probable cause for the arrest, search, and seizure. However, the view that such a right exists was expressed in Mr. Justice Burton's concurring opinion in *Brinegar*, 338 U.S. at 178–180, and in the Tenth Circuit opinion in that case. 165 F. 2d 512. The view has received articulation in recent rulings of the Eighth Circuit in *Smith* v. *United States*, 264 F. 2d 469, and *McCarthy* v. *United States*, 264 F. 2d 473. In *Smith*, the court of appeals said, 264 F. 2d at 472:

> Where the situation involved is one of such seeming probability, an Alcohol Tax Unit agent is warranted in stopping a car, with indication of his official status, for the purpose of inquiring of the driver as to his identity or making observation of the vehicle. Probable cause may perhaps not at that time exist for searching the interior of the car, but if there is a warranting basis for stopping the vehicle, such information as the agent acquires in incidence, from proper acts of conversation or observation, is legally entitled to be taken into account in testing the probable cause which can be regarded as existing as to a subsequent search in which the agent may engage.

In the companion case of *McCarthy* v. *United States*, 264 F. 2d 473, 475, the court said:

> We think that the elements of the present situation gave rise to such seeming probability as would be capable of reasonably impressing with more than mere suspicion that appellant was not going about ordinary affairs but was

> presumably engaged in using the car for improper alcohol-purpose. Within the basis discussed in *Smith* opinion, this entitled the agents to at least stop the car for the purpose of inquiring of the dealer as to his identity and making observation of the vehicle.

Choosing the opposite alternative from that adopted by this Court in *Brinegar,* the Eighth Circuit said:

> Whether, if the stopping had resulted in adding no further elements to the situation, the agents would have been justified in making a search of the car, we need not decide. As in the *Smith* case, elements were properly added by the stopping, which, in conjunction with what the agents had previously seen and knew, were entitled to be regarded as constituting adequate probable cause to warrant the search and seizure thereafter made. * * *

See also *Lawson* v. *United States,* 254 F. 2d 706 (C.A. 8); *Jordan* v. *United States,* 254 F. 2d 710 (C.A. 8); *Morgan* v. *United States,* 159 F. 2d 85, 86 (C.A. 10); and *Fowler* v. *United States,* 239 F. 2d 93, 96 (C.A. 10).

The Sixth Circuit has similarly held that the stopping of a vehicle does not constitute an arrest. *Gilliam* v. *United States,* 189 F. 2d 321 (C.A. 6). There, agents for the Alcohol Tax Unit, acting on information forwarded by a deputy sheriff which he stated had come from a reliable source, stopped the defendant on a public highway and asked him how much liquor he had with him. Defendant got out a small jar and said that was all, and that he had found it by

the public highway. The agents thereupon conducted a search of his vehicle, which revealed a substantial quantity of non-tax-paid liquor. In affirming the conviction, the court said (p. 323):

> The question presented is not whether probable cause existed before the automobile was stopped and the officers talked with appellant. The question is whether the combination of what the officers saw with the reliable information they had received is probable cause to justify the search.
>
> The stopping of appellant's car was not an arrest. No intent to apprehend appellant was shown and no move was made to take him into custody at that time. The officers did not open the car door when it was stopped, nor state that appellant was under arrest, nor touch his person. At the commencement of the search, which was after the car had been stopped, reasonable grounds existed for believing that a felony was being committed, and the subsequent arrest was valid.

Police officers have a duty to inquire even if they do not know enough to warrant arrest. The inconvenience to a citizen involved in the temporary stopping for inquiry is minor compared to the importance of such inquiry to proper law enforcement. A forcible stopping for inquiry must, moreover, have a reasonable basis. That reasonable basis may, however, be something less than would itself constitute probable cause for searching the vehicle or arresting the occupant, *i.e.*, probable cause to believe that a crime is or has been committed, or that contraband is in the car.

Where, as here, the officer does not stop the car, but for the purpose of making his inquiry merely approaches one which has already stopped, his action is proper if there is even slight basis for reasonable suspicion.

2. *The officers had a reasonable basis for inquiry*

At the time when officer Beckmann approached the taxicab in which petitioner was riding, he knew that petitioner had boarded the vehicle in an area of Los Angeles notorious for its illicit drug activity. The officer had personally made numerous arrests for offenses against the California narcotic drug laws in that section. Beckmann had observed petitioner's actions before petitioner boarded the conveyance; he had seen petitioner peer up and down the street and reconnoiter the parking lot before entering the waiting vehicle. It was itself unusual that the taxicab was waiting for petitioner in that place at that hour of the night. The net of all this was enough to give the officer reasonable ground for inquiry.

The officers did not impede the progress of the taxicab in any way; they waited until it stopped for a traffic signal before taking any step to confirm or dissipate their suspicions. Beckmann had no intention of making an arrest when he walked up to the vehicle; but he did intend to identify himself and make inquiry, hoping that if petitioner was then committing a narcotics offense he would take a step which would give himself away and or in some other manner confirm the officer's justified suspicions. Petitioner did just that, for as the officer identified him-

self petitioner dropped a filled container similar to that often used by narcotics dealers to transport their wares, and attempted to leave the vehicle.

As a Los Angeles city policeman, Beckmann was a peace officer charged with the duty of preventing and investigating public offenses. California Penal Code, §§ 15, 17, 697, 817; *People* v. *Perry*, 79 Cal. App. 2d 906, 180 P. 2d 465, 467. The total circumstances occurring in the nighttime here justified this experienced police officer in his determination to make inquiry. So long as inquiry was justified, the officer had good reason to approach the vehicle, more so than if petitioner had been a pedestrian, since the taxi would soon be on its way and impossible for an officer on foot to follow.

The courts have upheld inquiry under similar circumstances. In *People* v. *Blodgett*, 46 Cal. 2d 114, 293 P. 2d 57, 58, officers became suspicious of a taxicab which was double-parked in front of a hotel at 3:00 a.m. and approached to investigate. When they directed the defendant, one of the passengers in the vehicle, to alight, they saw him withdraw his hand from between the back seat and back cushion. Removal of the back seat revealed the presence of marihuana. The Supreme Court of California said:

> There is nothing unreasonable in an officer's questioning persons outdoors at night. * * * [I]n view of the hour and the unusual conduct of the occupants of the cab it was not unreasonable for the officers to order them to get out of the cab for questioning.

Lee v. *United States*, 221 F. 2d 29, 30 (C.A. D.C.), shows that what was done in this case was proper

under federal as well as California law. There, the police were investigating a murder and knew that jewelry had been stolen from the premises where the murder occurred. They received information that a person was attempting to sell jewelry on a metropolitan street. Police officers approached the automobile in which defendant was sitting and asked him to step out of the vehicle. As defendant complied, he dropped a number of articles of jewelry (wrapped in a handkerchief) in the street. Subsequent investigation disclosed that the jewelry had been stolen from a jewelry salesman and was not connected to the murder. The court of appeals had no difficulty in holding the jewelry admissible in defendant's prosecution for larceny, saying:

> The officers had no warrant. However they clearly had a right, indeed it was their duty investigating a murder and with the information upon which they acted, to approach, confront and interrogate the accused. * * *

Petitioner here might have elected to stand his ground and disclose nothing. He might not have confirmed the officer's suspicions in any way. Had he chosen that course, no arrest would have been made, since Beckmann did not intend to arrest on suspicion alone. But the officer was entitled to make inquiry to dissipate or confirm his suspicions, especially since it was not necessary to impede petitioner's progress in order to ask questions. Inquiry under the circumstances of this case, therefore, even if it could be construed as momentarily restricting petitioner's liberty, was both rational and lawful.

III

IF THE OFFICERS LAWFULLY APPROACHED THE TAXICAB, THEIR SUBSEQUENT SEIZURE OF THE NARCOTICS AND ARREST OF THE PETITIONER WERE LAWFUL

If we are correct in our view that the action of the officers in approaching the taxicab and identifying themselves did not itself invade any rights of petitioner's, their subsequent seizure of the narcotics and arrest of petitioner were fully justified by the intervening events and cannot seriously be challenged.

1. Analytically, the lawfulness of the seizure of the narcotics, the question directly at issue, does not depend upon either the fact or the legality of the arrest: the seizure would, we submit, have been proper even if, for example, the officers had not arrested petitioner as he emerged from the taxicab but had allowed him to leave unmolested.

Immediately after officer Beckmann identified himself, petitioner removed a white object from his pocket, dropped it to the floor, and attempted to leave the taxicab. At that point, as the district court held (R. 100–101), petitioner had intentionally abandoned the object in a public vehicle, and without more, the officers were entitled to take it into custody as abandoned property.[13]

---

[13] *Hester* v. *United States*, 265 U.S. 57, 58; *Haerr* v. *United States*, 240 F. 2d 533, 535 (C.A. 5); *Lee* v. *United States*, 221 F. 2d 21, 30 (C.A. D.C.); *Ellison* v. *United States*, 206 F. 2d 476, 478 (C.A. D.C.); *Martin* v. *United States*, 155 F. 2d 503, 504–505 (C.A. 5); *Brady* v. *United States*, 148 F. 2d 394, 395 (C.A. 9); see *Mason* v. *United States*, 257 F. 2d 359, 360 (C.A. 10), certiorari denied, 358 U.S. 831; cf. *Work* v. *United States*, 243 F. 2d 660 (C.A. D.C.); *Hobson* v. *United States*, 226 F. 2d 890, 893–894 (C.A. 8).

Whether or not the property was abandoned, it was subject to seizure as contraband which the officers came upon in the course of their lawful activities. Coupled with the officers' prior knowledge of petitioner's suspicious actions in an area noted for its narcotics activity, petitioner's attempt, upon seeing the officers, to rid himself of the object and take flight—precisely the action the officers had anticipated if petitioner did in fact have narcotics in his possession—by itself gave the officers reasonable cause to believe that the object contained narcotics. Turning the beam of his flashlight on the discarded object,[14] officer Beckmann saw it to be a condom filled with a whitish powder. Knowing from experience that such containers were commonly used to carry narcotics, the officer then knew to a virtual certainty that the object contained narcotics. And having come upon contraband in the course of their lawful activities, the officers were, as this Court has long recognized, entitled immediately to seize it without a warrant. *Harris* v. *United States*, 331 U.S. 145; *Zap* v. *United States*, 328 U.S. 624; *Steele* v. *United States*

[14] Beckmann did not make a "search" by looking into the vehicle, since it is not a search to see what is open and patent either in daylight or in artificial light generated by the officers. *United States* v. *Lee*, 274 U.S. 559; *Petteway* v. *United States*, 261 F. 2d 53, 54 (C.A. 4); *Bell* v. *United States*, 254 F. 2d 82, 87 (C.A. D.C.), certiorari denied, 358 U.S. 885; *Ellison* v. *United States*, 206 F. 2d 476, 478 (C.A. D.C.); *Fisher* v. *United States*, 205 F. 2d 702, 703 (C.A. D.C.), certiorari denied, 346 U.S. 872; *McQuaid* v. *United States*, 198 F. 2d 987 (C.A. D.C.), certiorari denied, 344 U.S. 929; *Safarik* v. *United States*, 62 F. 2d 892, 895 (C.A. 8); *Smith* v. *United States*, 2 F. 2d 715 (C.A. 4); *Boyd* v. *United States*, 286 Fed. 930 (C.A. 4).

No. 1, 267 U.S. 498; see *Adams* v. *New York*, 192 U.S. 585, 598; *Carroll* v. *United States*, 267 U.S. 132, 158.

2. Although we believe that the arrest was not a logically necessary step to justify the seizure, the seizure can also be sustained as incident to petitioner's lawful arrest.

Under § 836 of the California Penal Code (*supra*, pp. 2–3), the officers were authorized to arrest petitioner without a warrant if they had "reasonable cause to believe that he has committed a felony." The California courts have given to that standard substantially the same meaning as this Court has given to the "probable cause" standard of the Fourth Amendment—namely, knowledge of facts "'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

---

[15] Lower courts have consistently followed the same rule. See *Kelly* v. *United States*, 197 F. 2d 162 (C.A. 5) (customs official searching for aliens illegally entering the country found non-tax-paid liquor); *Love* v. *United States*, 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912 (distillery found in defendant's home by officers seeking to arrest one Foster, who was believed to be hiding therein); *Lane* v. *United States*, 148 F. 2d 816 (C.A. 5), certiorari denied, 326 U.S. 720 (officers searching for defendant to arrest him found articles used to make non-tax-paid liquor in defendant's garage); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 570–571 (C.A. 9), certiorari denied, 325 U.S. 877 (sales at illegal prices found while inspecting books required by law to be kept); *Bowles* v. *Ray*, 146 F. 2d 652 (C.A. 9), certiorari denied, 325 U.S. 875 (same); *Bennett* v. *United States*, 145 F. 2d 270 (C.A. 4), certiorari denied, 323 U.S. 788 (search warrant for counterfeiting apparatus justified seizure of counterfeit ration coupons). See also cases cited in n. 13, *supra*.

Draper v. *United States*, 358 U.S. 307, 313.[16] Thus, the legality of the arrest under both state and federal law turns upon the same question—whether at the time of the arrest the officers had probable cause to believe that petitioner was committing a felony.

If, as we have contended, the officers' initial approach did not constitute an arrest and petitioner was not arrested until he emerged from the taxicab, there can, we think, be no doubt of the legality of the arrest, for the intervening events gave the officers more than ample grounds to believe that petitioner was possessed of narcotics and hence committing a felony. While we do not contend that the officers had probable cause so to believe when they approached the taxicab, they did have such cause no later than the time when petitioner confirmed their suspicions (and rewarded their anticipations) by removing a white object from his pocket, dropping it on the floor, and

---

[16] The California courts use "probable cause" and "reasonable cause" interchangeably (*People* v. *Brown*, 147 Cal. App. 2d 352, 305 P. 2d 126, 128; *People* v. *Hood et al.*, 150 Cal App. 2d 197, 309 P. 2d 856, 858), defining the former as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true" (*People* v. *Wickliff*, 144 Cal. App. 2d 207, 300 P. 2d 749, 752, *People* v. *Mendoza*, 145 Cal. App. 2d 279, 302 P. 2d 340, 343; see *People* v. *Gusukuna*, 152 Cal. App. 2d 135, 312 P. 2d 714, 716) and the latter as "such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime" (*People* v. *Woods*, 139 Cal. App. 2d 515, 293 P. 2d 901, 907, certiorari denied, 352 U.S. 1006). See also *Trowbridge* v. *Superior Court*, 144 Cal. App. 2d 13, 300 P. 2d 222, 225.

attempting to flee. When officer Beckmann lighted the object with his flashlight and recognized it to be a condom, an article commonly used to carry narcotics, filled with a narcotic-like powder, the probable cause ripened into almost conclusive evidence and thus more than adequately supported the arrest.

It is established, of course, that officers have the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases." *Weeks* v. *United States*, 232 U.S. 383, 392; *Carroll* v. *United States*, 267 U.S. 132, 158; *Agnello* v. *United States*, 269 U.S. 20, 30. Here, it was not even necessary to search petitioner to recover the contraband. Policewoman Grace merely recovered the filled container from the floor of the taxicab where petitioner had dropped it in plain sight. On this basis, then, the seizure of the narcotics was reasonable as the lawful incident of a valid arrest.

CONCLUSION

For the foregoing reasons and those stated in our brief in No. 126, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

DECEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959

JOINT BRIEF OF
AMERICAN CIVIL LIBERTIES
UNION AND AMERICAN
CIVIL LIBERTIES UNION
OF SOUTHERN CALIFORNIA
AS AMICI CURIAE

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 4 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

A. L. WIRIN,
257 S. Spring Street,
Los Angeles 12, California,

ARTHUR D. DECKELMAN,

Attorneys for Amici Curiae.

ROWLAND WATTS,
MELVIN L. WULF,
of Counsel.

INDEX

	PAGE
Interest of Amici Curiae	1
Statement of the Case	2
Summary of Argument	3
ARGUMENT:	
I. Weeks v. United States, Rea v. United States and Benanti v. United States preclude the use of the evidence in question	4
II. A. On the facts of this case, the United States should be precluded from prosecuting petitioner after an earlier prosecution in a state court	7
B. The Federal Government, in deference to the Fourth Amendment, should be precluded from prosecuting petitioner	9
Conclusion	11

Citations

Abbate v. United States, 27 U. S. L. Week 4225 (U. S. March 30, 1959)	7, 8
Bartkus v. Illinois, 27 U. S. L. Week 4233 (U. S. March 30, 1959)	7, 8
Benanti v. United States, 355 U. S. 96 (1957)	4, 6, 7
Byars v. United States, 273 U. S. 28 (1927)	4, 10
Gallegos v. United States, 237 F. 2d 694 (C. A. 10, 1956)	5
Lanza v. United States, 260 U. S. 377 (1922)	3, 7, 9, 10
Lustig v. United States, 338 U. S. 74 (1949)	4
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955)	5, 7
Rea v. United States, 350 U. S. 214 (1956)	4, 5
United States v. Peterson, 268 Fed. 864 (1920)	8
Weeks v. United States, 232 U. S. 383 (1914)	4, 5, 7, 10
Wolf v. Colorado, 338 U. S. 25 (1949)	4, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

JOINT BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

Interest of *Amici Curiae*

The American Civil Liberties Union and its Southern California affiliate are submitting this brief with the consent of both parties, filed with the Clerk of this court. As the only nationwide non-partisan organization concerned solely with the safeguard of our constitutional rights, amici are again concerned with the deprivation of those fundamental rights.

Amici's interest in the present case concerns the application of the Fourth and Fifth Amendments. The right to privacy guaranteed by the Fourth Amendment has, we

believe, been breached by the decisions of the courts below. Likewise, we believe that the guarantee in the Fifth Amendment that an individual who has once been tried in a court of law shall not be tried again for the same offense has not been observed in this case.

It is our view that the Fourth and Fifth Amendments have been violated as the result of judicial efforts to accommodate our federal system. We do not believe that the interplay in that system should be permitted to defeat fundamental human liberties.

Statement of the Case

On February 18, 1957, while petitioner was in a taxi-cab, two Los Angeles police officers approached the cab which was waiting for a traffic signal. A series of events resulted in petitioner's arrest and the seizure of a package of narcotics which was found in the cab. There had been no warrant issued for petitioner's arrest nor for the search. Petitioner was unknown to police officers, had not been seen committing any offense, nor was he known to be a participant in a crime.

Criminal proceedings were instituted against petitioner in behalf of the People of California charging him with violating Section 11500 of the California Health and Safety Code.

On May 10, 1957, in the Superior Court of the State of California, petitioner's motion to suppress the package of narcotics on the ground it had been illegally seized was granted. A judgment of acquittal was thereupon rendered.

On June 19, 1957, the Federal Grand Jury for the Southern District of California, charged petitioner with a violation of 21 U. S. C. Section 174. On hearing prior to trial, petitioner's motion to quash the indictment on the

ground it had been obtained solely on the basis of the same evidence which the state court had suppressed as unlawfully obtained was denied. The court then considered the question of unlawful search and seizure de novo and ruled that the evidence had not been unlawfully obtained. The jury returned a verdict of guilty and sentence was imposed.

Appeal was filed by petitioner in the United States Court of Appeals for the Ninth Circuit which affirmed. A petition for certiorari was filed in this court and certiorari was granted March 20, 1959.

Summary of Argument

I

It is the common policy of the United States and California to exclude evidence that has been illegally obtained. The application of the "silver platter doctrine" by the court below circumvented this common policy. The fact that the state court found that state officials had illegally obtained evidence which was later used to prosecute petitioner in federal court, is persuasive reason to preclude its use by the federal courts.

II

A. The doctrine of *Lanza* v. *United States*, 260 U. S. 377 (1922), should not apply where the laws of a state and the national government prohibit the identical conduct.

B. Dual prosecution by a state and the national government, upon the facts of this case, gives disproportionate weight to the right of a sovereign to enforce its criminal laws at the expense of society's interest in the right to privacy guaranteed by the Fourth Amendment.

ARGUMENT

I

Weeks v. *United States*, *Rea* v. *United States* and *Benanti* v. *United States* preclude the use of the evidence in question.

Amici believe that prior cases by this court implementing the policy embedded in the Fourth Amendment, compel a holding in this case that the evidence in question was improperly admitted by the District Court.

From *Weeks* v. *United States*[1] to *Benanti* v. *United States*,[2] this court has been fashioning a rule to exclude evidence in federal prosecutions which has been wrongfully obtained, either in violation of the Constitution as in *Weeks*, or in violation of a statute[3] as in *Benanti*.[4] It has, however, declined to apply the rule to state prosecutions,[5] but in *Rea* v. *United States*[6] it was applied—under the power of the Supreme Court "to enforce the Federal Rules [of Criminal Procedure] against those owing obedience to them"[6a]—to enjoin a federal officer from testifying in a state court as to the fruits of his illegal search.

---

[1] 232 U. S. 383 (1914).

[2] 355 U. S. 96 (1957).

[3] 48 Stat. 1103, 47 U. S. C., Section 605.

[4] Until *Benanti*, this court had limited the exclusionary rule to wrongful seizures by Federal officers or those in which Federal officers had participated. *E.g. Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Lustig* v. *United States*, 338 U. S. 74 (1949); *Byars* v. *United States*, 273 U. S. 28 (1927).

[5] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[6] 350 U. S. 214 (1956).

[6a] *Id.* at 217.

During the same period of time, the lower federal courts have evolved a correlative rule—the "silver platter doctrine"—which permits evidence wrongfully seized by state officers alone to be used in a prosecution in the federal courts.[7]

Although the instant case comes within that doctrine, the fact that the California rule of evidence applicable to illegally seized evidence follows the *Weeks* rule[8] raises other considerations as well.[9]

By adopting the *Weeks* rule, the judiciaries of each sovereign have transformed a fundamental but static principle embedded in the Fourth Amendment into a dynamic norm of conduct. But by application of the "silver platter doctrine," the court below has affirmed the circumvention of this common policy notwithstanding an express finding by the state court that state officers had illegally procured evidence, thereby vitiating a state prosecution. We believe these circumstances bring this case squarely within the ambit of *Rea v. United States, supra.*

In *Rea*, this court enjoined a federal agent from testifying in a state court concerning the fruits of his search found by a United States District Court to have been illegally conducted. In the case at bar the circumstances are identical but reversed, i.e., evidence illegally procured under state law by a state officer is sought to be used in a federal prosecution. That the federal court made a de novo determination of the legality of the search is, we suggest, beside the point. Whether or not the state court in *Rea* would also have held a de novo hearing did not concern

[7] *E.g., Gallegos* v. *United States*, 237 F. 2d 694 (C. A. 10, 1956).

[8] *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[9] Amici wish to point out that they entirely agree with the grounds for reversal set forth in petitioner's brief. They are, however, impressed by the circumstances raised by virtue of the California exclusionary rule and will stress that point in this brief.

this court; rather, it held that the fruits of an illegal search by a federal officer were ipso facto inadmissible in *any* court. The court said, "[The Federal Rules] are designed to protect the privacy of the citizen. * * * That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."[10] Putting to the side the question whether a state court has the power to enjoin a state officer from testifying in a federal court as not in issue here, there is no question that this court's "supervisory powers over the Federal court system"[11] permits the exclusion of the evidence in question. We urge that it do so.

This court is committed to the principle that an illegal search by state officers contravenes the Fourth Amendment.[12] Regardless of its view as to the constitutionality of the admission of such evidence in the state courts, where considerations of comity exist that are not present here, we urge the court to buttress the right to privacy guaranteed by the Fourth Amendment by refusing to countenance illegal conduct of state law enforcement officers as a means of enforcing the criminal law of the United States.

Benanti v. *United States*, *supra*, lends further support to this position. The rationale of that case was that "Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications"[13] and the purpose of excluding evidence obtained in violation thereof was the "enhancement of the proper administration of criminal justice."[14]

---

[10] 350 U. S. at 218.

[11] *Benanti* v. *United States*, 355 U. S. at 99.

[12] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[13] 355 U. S. at 102.

[14] *Id.* at 103.

The rule in *Weeks* and *Cahan*,[15] although judicial rather than legislative, is at least as absolute as the prohibition in Section 605. Its violation by state officers should be no more condoned than was the violation in *Benanti*. In addition, the evidence here was inadmissible in the state court whereas in *Benanti* the wiretap evidence would have been admissible in the New York courts.[16] A state court ruling which fructifies a policy embodied in the Constitution ought not be lightly repudiated.

II

A. On the facts of this case, the United States should be precluded from prosecuting petitioner after an earlier prosecution in a state court.

In *Lanza* v. *United States*[17] it was announced that "* * * an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. The Fifth Amendment, like all other guarantees in the first eight amendments, applies only to proceedings by the Federal Government, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[18]

We disagree with *Lanza* and believe that its doctrine should not be applied here. Prior to *Lanza*, it had been

---

[15] *Supra* note 8.

[16] 355 U. S. at 102.

[17] 260 U. S. 377 (1922).

[18] *Id.* at 382. This court recently reaffirmed the *Lanza* doctrine: *Abbate v. United States*, 27 U. S. L. Week 4225 (U. S. March 30, 1959); *Bartkus v. Illinois*, 27 U. S. L. Week 4233 (U. S. March 30, 1959).

held—with reference to the same body of law, viz., the National Prohibition Act,[19]—that where both the state and federal governments proscribed identical conduct, "a conviction in a state court for conduct which is in violation of the Prohibition Act, is a bar to a prosecution in the federal courts."[20]

We believe that the distinction to be drawn is between (a) identical conduct prohibited in closely identical terms, and (b) related conduct growing out of the same transaction but which clearly covers a peculiar interest of each sovereign. In the first case, a prosecution by one sovereign should bar a subsequent prosecution by the other. In the second case, double jeopardy ought not attach.

The instant case involves a violation of 21 U. S. C., Section 174 and Section 11500 of the California Health and Safety Code.[21] Each statute prohibits the identical conduct. Putting to the side the question of dual prosecution under closely related conduct, it is plain to us that dual prosecution for identical conduct is a manifest injustice. It vests in prosecuting officers the discretion of imposing double punishment.[22] Such unbridled discretion grants executive officials a power subject to dangerous abuse which, under other circumstances than those present here, could raise substantial questions under the due process clause of the Fifth Amendment and under the Eighth Amendment.

Under the circumstances of the case at bar, we believe the Fifth Amendment prohibition against double jeopardy

---

[19] 41 Stat. 305.

[20] *United States* v. *Peterson*, 268 Fed. 864 (1920).

[21] Both statutes are set out in full in Petitioner's brief, p. 84.

[22] See the statement of Attorney-General William P. Rogers issued shortly after the decisions in *Abbate* and *Bartkus*, *supra*, note 18. N. Y. Times, April 6, 1959, p. 1, col. 4. The instant prosecution was instituted prior to that statement.

bars the prosecution below. At the very least, the concept of dual sovereignty should yield where an earlier state prosecution has been instituted under a statute proscribing identical conduct.

B. The Federal Government, in deference to the Fourth Amendment, should be precluded from prosecuting petitioner.

The Fourth Amendment to the Constitution protects the people of the United States against illegal search and seizure by state officials.[23] Mr. Justice Frankfurter, speaking for a majority of the court, said, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause."[24] The doctrine announced in *Lanza* must be examined in light of the Fourth and Fourteenth Amendments.

In the case at the bar the earlier prosecution did not determine that the petitioner had or had not committed an offense against a sovereign, but rather it was determined in preliminary proceedings that the prosecution must fall because state officers had failed to observe a constitutional mandate prohibiting illegal search and seizure. California, like the United States, implements this constitutional right by prohibiting the use of evidence procured through its violation. This circumstance significantly distinguishes the instant case from other applications of the *Lanza* doctrine.

Where the United States government undertakes to prosecute an individual after he has been tried for related acts in a state court, we will admit, arguendo, that the subsequent prosecution is warranted on the ground that

[23] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[24] *Id.* at 27.

the Federal government is thereby protecting a valid national interest, viz., protecting itself against criminal acts. But where—as here—the earlier prosecution has failed due to the violation of a constitutional proscription, that interest of the federal government does not stand alone. It must be weighed against the interest of society as a whole in preserving intact the constitutional prohibition against the invasion of privacy.

The guarantee against the invasion of privacy has been strengthened by both the United States and California by prohibiting the admission of evidence obtained in violation of that guarantee. Both sovereigns believe that such a rule of evidence plays an indispensible role in enforcing the right to privacy. The rule is a reflection of the judicial interest in the social value to be ascribed to protection against "arbitrary intrusion by the police." Speaking for the court, Mr. Justice Day in *Weeks* said, "To sanction [the admission of illegally seized evidence] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the *people* against such unauthorized action." (Emphasis supplied.)[25]

The interests to be weighed here are the right of the United States to prosecute crimes against itself; and the right of the people to be free of illegal search and seizure. In *Weeks* the balance was struck in favor of the right to privacy. In *Lanza* the balance tipped in favor of the sovereign. Where elements of the two combine, we urge

---

[25] *Weeks* v. *United States*, 232 U. S. 383, 394. Mr. Justice Sutherland's views were to the same effect: "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies, and the assurance of any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the Constitutional right." *Byars* v. *United States*, 273 U. S. 28, 33-34.

that the fundamental nature of the right to privacy transcends, in a federal system, a sovereign's right to place a citizen twice in jeopardy.

The United States government need not indulge in methods which "regarded superficially, may seem to escape the challenge of illegality."[26] It should be content to rely upon a state court's determination where that determination breathes life into the Constitution.

Conclusion

The right to be free of gratuitous governmental interference stands high in the hierarchy of civil liberties. Consequently, not only the interests of the injured individual come to bear in a given case. Rather, the cumulative interest of society as a whole is always at stake when the liberty of any one of us is infringed. The decision in this case revolves around the conflict between the enforcement of the criminal law and the integrity of the Constitution. We urge that the Constitution prevail.

By reason of the foregoing, the decision below should be reversed.

Respectfully submitted,

A. L. Wirin,
257 S. Spring Street,
Los Angeles 12, California,

Arthur D. Deckelman,

Attorneys for Amici Curiae.

Rowland Watts,
Melvin L. Wulf,
of Counsel.

---

[26] *Supra* note 25.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 22 1960
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California

HARVEY M. GROSSMAN
Of Counsel

INDEX

SUBJECT INDEX

	Page
Statement of Facts	2
A. Events at First and Flower	2
B. Events at First and State Streets	3
C. Lack of Federal Cooperation	6
D. State Court Proceedings	6
E. Federal Court Proceedings	7
F. Defendant's Position on Appeal	7
Summary of Argument	7
Argument	9
I. The Search and Seizure in the Instant Case Was Made Without Probable Cause	9
II. There Was No Probable Cause for the Arrest in the Instant Case	12
III. The Government's "Right to Detain" Theory Should Not Be Adopted by This Court. Moreover, Even if Adopted It Would Not Validate the Police Conduct in the Instant Case	15
A. The Government's "Right to Detain" Theory Is Unsupportable in Terms of Logic or Precedent	15
B. The Government's "Right to Detain" Theory Is Unsound From a Policy Standpoint	23
C. The Police Conduct in the Instant Case Was Improper in Any Event	28
IV. The Search and Seizure in the Instant Case Cannot Be Justified on an Abandonment Theory	30
V. The Search and Seizure in the Instant Case Cannot Be Justified on a Contraband Theory	34
Conclusion	35

TABLE OF AUTHORITIES CITED

Page

Cases:

Badillo v. *Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956) 30

Baines v. *Brady*, 122 Cal. App. 2d Supp. 957, 265 P.2d 194 (1953) 19

Bell v. *United States*, 254 F.2d 82 (C.A.D.C. 1958) 34

Boyd v. *United States*, 286 Fed. 930 (C.C.A.4, 1923) 35

Brady v. *United States*, 148 F.2d 394 (C.C.A.9, 1945) 33

Brinegar v. *United States*, 338 U.S. 160 (1949) 20, 26

Brown v. *United States*, 256 U.S. 335 (1921) 11

Bynum v. *United States*, 262 F.2d 465 (C.A.D.C. 1958) 25

Campbell v. *Commonwealth*, 203 Ky. 151, 261 S.W. 1107 (1924) 23

Carroll v. *United States*, 267 U.S. 132 (1924) 33

Carter v. *United States*, 231 F.2d 232 (C.A.5, 1956) 19

Cervantes v. *United States*, 263 F.2d 800 (C.A.9, 1959) 25

Draper v. *United States*, 358 U.S. 307 (1959) 16

Ellis v. *United States*, 264 F.2d 372 (C.A.D.C. 1959) 24

Ellison v. *United States*, 206 F.2d 476 (C.A.D.C. 1953) 32

Fisher v. *United States*, 205 F.2d 702 (C.A.D.C. 1953) 35

Fowler v. *United States*, 239 F.2d 93 (C.A.10, 1956) 21

Gascon v. *Superior Court*, 169 Cal. App. 2d 356, 337 P.2d 201 (1959) 30, 31

Gilliam v. *United States*, 189 F.2d 321 (C.A.6, 1951) 21

Gisske v. *Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908) 23

Green v. *United States*, 259 F.2d 180 (C.A.D.C. 1958) 24

Page

Haerr v. *United States*, 240 F.2d 533 (C.A.5, 1957) 31
Hargus v. *State*, 58 Okla. Cr. 301, 54 P.2d 211 (1935) 19
Harris v. *United States*, 331 U.S. 145 (1947) 33
Henry v. *United States*, 361 U.S. 98 (1959) 8, 12, 15, 16
Hester v. *United States*, 265 U.S. 57 (1924) 31
Hobson v. *United States*, 226 F.2d 890 (C.A.8, 1955) 32, 33
Jenkins v. *United States*, 161 F.2d 99 (C.C.A.10, 1947) 25
Johnson v. *State*, 118 Tex. Cr. 293, 42 S.W.2d 421 (1931) 23
Jordan v. *United States*, 254 F.2d 710 (C.A.8, 1958) 24
Lawson v. *United States*, 254 F.2d 706 (C.A.8, 1958) 24
Lee v. *United States*, 221 F.2d 29 (C.A.D.C. 1954) 25
Long v. *Ansell*, 69 F.2d 386 (C.A.D.C. 1933) 19
Martin v. *United States*, 155 F.2d 503 (C.C.A.5, 1946) 32
Mason v. *United States*, 257 F.2d 359 (C.A.10, 1958) 33
McCarthy v. *United States*, 264 F.2d 473 (C.A.8, 1959) 21
McQuaid v. *United States*, 198 F.2d 987 (C.A. D.C. 1952) 35
Morgan v. *United States*, 159 F.2d 85 (C.C.A.10, 1947) 24
Morton v. *United States*, 147 F.2d 28 (C.A.D.C. 1945) 24
Pena v. *State*, 111 Tex. Cr. 218, 12 S.W.2d 1015 (1929) 23
People v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956) 29
People v. *Henneman*, 367 Ill. 151, 10 N.E.2d 649 (1937) 23

Page

People v. *Jaurequi*, 142 Cal. App. 2d 555, 298 P.2d 896 (1956) 23
People v. *Michael*, 45 Cal. 2d 751, 290 P.2d 852 (1955) 22
People v. *Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350 (1956) 5
People v. *Perry*, 79 Cal. App. 2d Supp. 906, 180 P.2d 465 (1947) 29
People v. *Schraier*, 141 Cal. App. 2d 600, 297 P.2d 81 (1956) 25
People v. *Seely*, 66 Cal. App. 2d 408, 152 P.2d 454 (1944) 22
People v. *Silvestri*, 150 Cal. App. 2d 114, 309 P.2d 871 (1957) 4
People v. *Smith*, 141 Cal. App. 2d 399, 296 P.2d 913 (1956) 22
Poulas v. *United States*, 95 F.2d 412 (C.C.A.9, 1938) 18
Price v. *United States*, 262 F.2d 684 (C.A.10, 1959) 29
Safarik v. *United States*, 62 F.2d 892 (C.C.A.8, 1933) 35
Smith v. *United States*, 264 F.2d 469 (C.A.8, 1959) 20, 21
Smith v. *United States*, 2 F.2d 715 (C.C.A.4, 1924) 35
State v. *Gulczynski*, 32 Del. 120, 125 Atl. 88 (1922) 23
State v. *Zupan*, 155 Wash. 80, 283 Pac. 671 (1929) 24
Steele v. *United States*, 267 U.S. 498 (1925) 33
United States v. *Lee*, 274 U.S. 559 (1927) 35
Weathersbee v. *United States*, 62 F.2d 822 (C.C.A.5, 1933) 22
White v. *United States*, 271 F.2d 829 (C.A.D.C. 1959) 3
Work v. *United States*, 243 F.2d 660 (C.A.D.C. 1957) 32
Wrightson v. *United States*, 222 F.2d 556 (C.A.D.C. 1955) 4
Zap v. *United States*, 328 U.S. 624 (1946) 33

Page

STATUTES:

California Penal Code, Sections 15, 17, 697 29
Restatement of Torts, Section 112 24

MISCELLANEOUS:

Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 N.W. L.Rev. 16 (1957) .. 17, 27
Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Georgetown L.Jour. 1 (1958) 25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

In view of the fact that the brief of the United States is confined to the first of the two issues upon which certiorari was granted, *i.e.*, the unlawfulness of the search and seizure, the present reply brief is likewise confined to that issue. The Government has indicated that it intends to file its brief with respect to the second issue in connection with its brief in *Elkins* v. *United States*, No. 126, October Term 1959; it is anticipated that we will file a further reply addressed to the "Silver Platter" doctrine after we receive the Government's brief in *Elkins* v. *United States, supra.*

Statement of Facts

The statement of facts set forth at pages 3 to 7 of the Government's brief, and seriatim thereafter, does not accurately portray the factual context in which the issues raised in the instant case must be resolved. Accordingly, we believe it in order to comment briefly upon the pertinent facts as established by the record before this Court.

A. Events at First and Flower.

The events which led police officers Beckman and Grace to follow and apprehend defendant were completely devoid of the sinister overtones which the Government seeks to impart to them. Officer Beckman merely testified that defendant glanced about before entering a cab at First and Flower Streets[1], shortly before 11 p.m. (R. 14-15).[2] Certainly the mere entering of a cab at night is hardly a suspicious circumstance, nor was there anything particularly suspicious about the fact that defendant may have glanced about momentarily before entering the taxicab.

The fact that Officer Beckman may have arrested a narcotics suspect who had been using a taxicab some three months before is hardly sufficient to suggest that the use of such a conveyance is in itself a suspicious circumstance. In fact, Beckman's testimony that only one of 22 prior narcotics arrestees had been using a taxicab implies the contrary[3] (R. 12).

---

[1] The point at which defendant entered the cab is approximately one block from the Los Angeles Civil Center.

[2] In accordance with the practice followed in our opening brief, the Transcript of Record—will hereafter be designated by the legend "R" followed by appropriate page and line numbers; the Brief for the United States as "Gov't Br." followed by appropriate page numbers, and Petitioner's Opening Brief as "Pet. Op. Br." followed by appropriate page and line numbers.

[3] The record does not establish that the prior taxicab arrest was in the same locality.

Finally, the fact that most of Beckman's narcotics arrests were made in the area of First and Flower is not significant in light of the fact that he had been assigned to that territory over a long period of time (R. 55). Moreover, the suggestion that a particular area of a city may be regarded as tainted so that anyone seen there may be "detained" is hardly consonant with the concept of a democratic society.[4]

B. Events at First and State Streets.

The events at First and State Streets cannot be artificially dissected as the Government suggests, but must be viewed as a part of a single transaction in which Officers Beckman and Grace, having followed defendant's cab for some two miles, pulled up behind it and set in motion a course of events which culminated in the seizure of the narcotics in question.

Moreover, the picture of those events evidenced by the record is far different than that which the Government attempts to portray.[5]

---

[4] See, *White* v. *United States*, 271 F.2d 829 (C.A.D.C. 1959), where the court proscribes such police practices.

[5] The Government's account of events at First and State Streets is not completely accurate. (See Pet. Op. Br. pp. 3-9.) For example, the door of the taxicab was not opened by defendant in the course of his flight, as suggested by the Government, but was opened by Officer Beckman. (R-85-86, 150.) In a later retelling of his story, Beckman modified it by having the defendant seek to open the door at approximately the same time Beckman opened it.

It should be noted that the Government, like Officer Beckman, embellishes its account with each telling. Beckman originally testified that it was he who opened the door. At page 5 of the Government's Brief, it is stated that "the officer sought to open the cab door to retrieve the white object; petitioner simultaneously attempted to open and exit through the same door." In recounting the same events at page 15, the Government asserts that "petitioner . . . opened the door and attempted to take flight".

First of all, the Government ignores the full impact of the simultaneous approach of Officers Beckman and Grace after they had pulled up behind the cab.[6]

While Officer Beckman did testify that the cab was stopped for a light at the time the officers approached it, that does not detract one *iota* from the fact that the cab was in fact a moving vehicle (*albeit* it had stopped momentarily for a traffic signal), moving along the center lane of a busy thoroughfare (R. 13). Moreover, in light of the fact that the burden of proof was on the Government to justify the search in question, in the absence of any direct testimony that the signal remained red during all of the events in question, the contrary must be assumed.[8] Indeed, it is practically inconceivable that the signal would have remained red during the entire course of events.[9]

In any event, if the mere fact that a moving vehicle is momentarily stopped at a traffic signal places its occupant in the position of a pedestrian, as suggested by the Government, the distinction between the questioning of a pedestrian and the stopping of a moving vehicle, which the Government itself concedes to exist, would be rendered illusory, since any moving vehicle in urban traffic will be required to stop for traffic signals occasionally. While overtaking a vehicle stopped at a red light may present less physical danger than overtaking it while it is in movement,

---

[6] One of the Government's own witnesses testified that shortly after identifying himself, Officer Beckman displayed a revolver. (R. 109-112.)

[7] See, *Cervantes* v. *United States*, 263 F.2d 800, 805 (C.A.9, 1959) and *Wrightson* v. *United States*, 222 F.2d 556 (C.A.D.C. 1955).

[8] The record does not support the Government's assertion (Gov't. Br., footnote p. 18) "that such evidence as there is indicates that it is likely that it had not [changed]".

[9] The Government concedes that the police did not have probable cause for a search and seizure at this point. (Govt. Br., p. 43.)

the danger to civil liberties, with which we are here concerned, is equally grave in either case. Under the Government's theory, the police need merely follow a moving vehicle until it stops for a traffic signal—as was in fact done in the instant case—and will then be in a position to claim that they did not stop a "moving vehicle". A moment's reflection reveals the sophistry in such a contention.

Officer Beckman was admittedly bent upon investigating narcotics. This, of course, leads to the query: What was contemplated by such an investigation? The logical answer, we submit, is: *a search and seizure without warrant or probable cause.* The Government, however, seizing upon an isolated sentence in Officer Beckman's testimony, suggests that he merely wished to induce defendant to attempt to dispose of any narcotics in his possession. But even assuming, *arguendo*, such to be the fact, one may well ask: How was the defendant to be so induced? Obviously, by the threat to conduct an unquestionably unlawful search and seizure. Otherwise, the defendant could hardly be expected to disgorge incriminating evidence of his own guilt. As we shall point out hereafter, such a course of conduct would in itself constitute an invasion of defendant's constitutional rights. For present purposes we merely wish to note that the Government's suggestion that Officer Beckman's intentions were entirely innocent is untenable.[10]

---

[10] Officer Beckman's testimony that the taxicab in which defendant was riding had gone through a traffic signal under "borderline conditions" is immaterial, particularly in view of the fact that the police did not then overtake the cab but instead proceeded to follow it for some two miles, obviously bent on bigger game.

See *People* v. *Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350 (1956), where the court observes (146 Cal. App. 2d 130-131):

"The search of which appellants complain was made after they were arrested for having made a 'U' turn in violation of section 541 of the Vehicle Code.

"The search, which, as stated above, was of an automobile in which appellants were traveling at the time of their arrest, was

C. Lack of Federal Cooperation.

The Government's assertion (Govt. Br. p. 6) that Officer Beckman "had never had occasion to work with federal officers" is not supported by the record. In point of fact, when defense counsel attempted to inquire on cross-examination with respect to Beckman's past cooperation with federal officers, he was prevented from doing so by the trial court, which, as noted in our opening brief (footnote, p. 11), unduly restricted defendant's cross-examination in this regard.

D. State Court Proceedings.

The Government's account of the State Court proceedings (Govt. Br. footnote, p. 6) involves an apparent misunderstanding of California practice. The trial court proceedings were not similar to a pre-trial motion to suppress, as the Government suggests. Rather, the State, having presented its entire case at the "preliminary examination" and having no further evidence to offer at the trial, consented to have the case heard and determined on the basis of the testimony adduced at the preliminary hearing, a practice frequently employed in California as a means of avoiding duplication of testimony. The trial court suppressed the State's principal evidence on the ground that it had been unlawfully obtained. Since the State had no further evidence to offer, acquittal of defendant followed as a matter of course, just as would have been the case in the federal courts had the evidence in question been suppressed at the trial.

---

made without a warrant. Obviously, the search bore no relation to the traffic violation nor to the vagrancy charges upon which appellants were booked, and, therefore, was not justified as incidental to the arrest therefor. . . ."

E. Federal Court Proceedings.

The District Court judge in the instant case did not make any findings of fact as suggested by the Government (Govt. Br. p. 7).

F. Defendant's Position on Appeal.

Defendant has never conceded the lawfulness of the search and seizure in the instant case, as the Government implies (Govt. Br. pp. 7-8), although we earnestly believed that it was not necessary to reach this question in light of the State Court's determination.

Furthermore, we have not presented any question of double jeopardy beyond this Court's limited grant of *certiorari*, as the Government suggests (Govt. Br. p. 8). Rather, we merely urged in our opening brief that the decision of the State Court with respect to the invalidity of the arrest (involving a question of state law) should be considered in determining whether the search may be justified as incident to a lawful arrest.

Summary of Argument

The Government concedes a lack of probable cause at the time Officers Beckman and Grace overtook the cab at First and State Streets and "commenced" their investigation." The Government urges, however, that there was no "arrest" at that point and hence the officers' conduct was perfectly lawful. In so urging, the Government loses sight of the real point at issue here, namely, *whether there was an unlawful search and seizure. In point of fact, such an unlawful search and seizure did take place at a time when the police had no reasonable basis whatever to suspect defendant of any wrongdoing.*

Moreover, the arrest in the instant case occurred when defendant was apprehended by the police, as the state court properly recognized. The Government's assertion to the contrary flies squarely in the face of this Court's recent decision in *Henry* v. *United States*, 361 U.S. 98 (1959).

The Government's suggestion of a "right to detain" without probable cause if there is a "slight basis for reasonable suspicion" is without support in precedent, logic or sound policy. The proposed standard is so vague as to be practically meaningless and would present insuperable problems of judicial supervision. Moreover, insofar as the proposed standard may have any content, it would represent the replacement of probable cause by mere suspicion as a basis for police detention—a practice repeatedly condemned by the courts and one which is irreconcilable with our constitutional democracy. Furthermore, the requirements of crime prevention and detention do not necessitate any such right of detention on suspicion. And even assuming, *arguendo*, that such a right to detain were established, it would not serve to validate the conduct of the police in the instant case.

In short, the search and seizure in the instant case cannot be sustained on any theory. Therefore, the decision below should be reversed.

ARGUMENT

I.

The Search and Seizure in the Instant Case Was Made Without Probable Cause.

The Government concedes a lack of probable cause at the time Officers Beckman and Grace overtook the calf at First and State Streets and "commenced their investigation." The Government urges, however, that there was no arrest at that point and hence the officers' conduct was perfectly lawful. In so urging, the Government loses sight of the real point at issue here, which is not whether there was an arrest at that point (although, as we shall demonstrate, there clearly was), but rather *whether there was an unlawful search and seizure*. The matter of arrest was discussed in our opening brief in anticipation of the Government's expected claim that the search and seizure in the instant case could be justified as incident to a lawful arrest. This does not mean that there could be no unlawful search and seizure in the absence of an arrest. *In the instant case, such an unlawful search and seizure did take place at a time when the police had no reasonable basis whatever to suspect defendant of any wrongdoing.*

The Government's suggestion that the police may properly use the threat of an unlawful search and seizure as a means of forcing a suspect to divest himself of evidence of guilt is untenable. Admittedly, such practices would not bear fruit except where the suspect does possess some damaging article on his person. But the same may be said where the officers actually complete the search and seizure; *i.e.*, they will not uncover anything of value unless the suspect is in fact possessed of some incriminating article.

Yet, such an argument could hardly be urged seriously as a defense to an unlawful search and seizure of the more traditional sort. Neither should it prevail where, as here, the police employ the more subtle approach of forcing the suspect to disgorge evidence of his own guilt by the threat of search and seizure. Certainly the threat to civil liberties is equally great in either case.[11]

But, says the Government, the police officers were merely acting like private citizens in questioning the defendant. We submit that the facts of the instant case, as reflected in the record and heretofore summarized, far transcend mere questioning. Moreover, a police officer, reflecting as he does the power of law enforcement, cannot properly be likened to a private citizen. Where a private citizen is involved, a degree of annoyance must sometimes be treated as an inevitable consequence of social intercourse, but the right to be free from governmental interference—or more particularly the right to be let alone by officers of the law—has been constitutionally secured. Furthermore, while one may shrug off an annoyance by a private citizen, can it seriously be contended that defendant, when his cab was overtaken and literally surrounded by the police, had any real freedom of movement? Is it really likely that Officer Beckman would have tolerated a casual disregard of his investigation. Certainly, it does not take much imagination to visualize what would have happened had the defendant attempted to depart.[12]

---

[11] Moreover, an innocent person thus accosted would be more than slightly inconvenienced, as the Government suggests. Indeed, the cab driver in the instant case, when called as a witness by the Government, declared that he was quite perturbed by Officer Beckman's strong-arm tactics. (R. 109-112.)

[12] It must be recalled that the cab driver was also fearful of the police and would hardly have obeyed an order by defendant to drive on, if defendant had had the temerity to give such an order.

Again, is it reasonable to assume that any layman (or even most lawyers) could be expected calmly to ask a police officer whether he was being held and if so under what authority.[13] Certainly few would be so bold as to assert their constitutional rights under circumstances in which a dramatic violation of those rights was already in progress.[14]

The Government asserts (Govt. Br., pp. 19-20) "However insubstantial, or even irrational, the reasons for his suspicions, a police officer may properly approach a suspect, even at his home, explain his suspicions, and ask him questions about his actions . . ." While the action of the police in the instant case goes far beyond any such casual questioning, it is submitted that the rule as above stated is more descriptive of a police state (whose inhabitants must carry identification cards) than of a constitutional democracy where citizens are free to come and go as they please.

---

[13] One is reminded of Justice Holmes' remark that "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown* v. *United States*, 256 U.S. 335 (1921).

[14] The fact that a civil action would likely be unsuccessful, as urged by the Government (Gov't. Br. p. 18), is precisely one of the reasons why the exclusionary rule was adopted by this Court. (See Pet. Op. Br., App. A.)

II.

There Was No Probable Cause for the Arrest in the Instant Case.

As heretofore pointed out, the search and seizure in the instant case were unlawful regardless when the arrest occurred. However, since the Government labors at great length concerning the time of the arrest, we believe it in order to point out that the arrest in fact occurred when defendant was apprehended by the state police, and at a time when the Government itself concedes a lack of probable cause (Gov't. Br. p. 45). In this regard we wish to note that inso ar as state law is controlling here, the ruling of the State Court must be regarded as binding.

Moreover, the position which the Government is urging here has already been resolved adversely to it in *Henry* v. *United States, supra*, 361 U.S. 98, recently decided by this Court.[15]

In the *Henry* case, *supra* (80 S.Ct. 169):

> "There was a theft from an interstate shipment of whisky at terminal in Chicago. The next day two FBI agents were in the neighborhood investigating it. They saw petitioner and one Pierotti walk across a street from a tavern and get into an automobile. The agents had been given, by the employer of Pierotti, information of an undisclosed nature 'concerning the implication of the defendant Pierotti with interstate shipments.' But, so far as the record shows, he never went

[15] The mere fact that the Government has adopted a position of non-acquiescence in the *Henry* decision does not detract one *iota* from its effect. Furthermore, the *Henry* case was decided not merely on the basis of a concession by the Government, as the Government now suggests, but on a thorough consideration of the applicable constitutional principles.

so far as to tell the agents he suspected Pierotti of any such thefts. The agents followed the car, saw it enter an alley, and stop. Petitioner got out of the car, entered a gangway leading to residential premises and returned in a few minutes with some cartons. He placed them in the car and he and Pierotti drove off. The agents were unable to follow the car. But later they found it parked near the same tavern. Shortly they saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it going in opposite directions, waved it to a stop. . . ."

In holding that there had been an unlawful search and seizure, the Court, speaking through Mr. Justice Douglas, declared (80 S.Ct. 171, 172):

"The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. *That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.* It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as Johnson v. United States, supra, holds.

"... What transpired at or after the time the car was stopped by the officers, is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.

"The fact that the suspects were in an automobile is not enough. Carroll v. United States, supra, liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause." (Emphasis added.)

Finally, we wish to note that the formal arrest in the instant case, which occurred long after the actual arrest of defendant, cannot relate back so as to justify a prior course of illegal conduct. Thus, by the time of the formal arrest the unlawful search and seizure had already commenced and defendant had already been unlawfully detained and arrested. Under such circumstances, it is clear that the mere formality of later announcing an arrest could not justify unlawful conduct that had previously transpired.

III.

The Government's "Right to Detain" Theory Should Not Be Adopted by This Court. Moreover, Even If Adopted It Would Not Validate the Police Conduct in the Instant Case.

A. The Government's "Right to Detain" Theory Is Unsupportable in Terms of Logic or Precedent.

The Government's suggestion of a "right to detain" without probable cause[16] is without support in precedent, logic or sound policy. Moreover, it is contrary to the views voice by this Court in *Henry*. (See pages 12-14, *supra*.) In essence, it is an attempt to "water down" the constitutional guarantee against unreasonable search and seizure by permitting police "detention" without probable cause.

The historical justification urged in support of the Government's position falls far short of the mark. Thus, while the watchman of Medieval England may have been empowered to make an over-night arrest of any stranger he encountered, such a power could hardly be tolerated in a modern democratic state in which adults may come and go as they please without accounting to the constabulary for their movements.

---

[16] The Government summarizes its position as follows (Gov't. Br. p. 26):

". . . that a police officer may stop a person for the purpose of inquiry on less information than would constitute a probable cause for his arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest. We think further that this is as true of a passenger or driver in a vehicle as it is of a person walking in the street, except to the extent that, in judging the reasonableness of the officer's action, one factor to be considered is the manner in which the vehicle is stopped.

Again, at page 37, the Government states that such police inquiry is "proper if there is even slight basis for reasonable suspicion."

Furthermore, while the Government suggests an historical right of detention separate and apart from a right of arrest, the very authority which the Government cites uses the terms interchangeably, for the passage from Hawkins quoted by the Government describes overnight detention by a watchman as an "arrest." (Gov't Br. p. 26.)[17]

A recent writer in the field has pointed up the utter sophistry in the distinction which the Government is urging.

> "The same attempt to distinguish a 'detention' from an 'arrest' was made by police witnesses before the British Royal Commission, and were characterized by it as 'sophistries'; the Commission said that the relationship of detention to arrest was that of 'a distinction which is without a difference.' What such an alteration of labels obscures, of course, is the fact that no matter what you call it, an imprisonment has taken place. The constitutional use of the word 'seizure' certainly contemplates a right against unreasonable imprisonment. The fact that the imprisonment may be limited to a few hours or may not result in a criminal record is irrelevant to the goal of achieving freedom to go about and do what one pleases, subject to interruption only upon reasonable cause. This is of the essence of 'the right of the people to be secure in their persons. . . .'
>
> "Constitutionally, therefore, the crucial fact is that there has been a seizure without probable cause, accompanied by most of the significant consequences of a conventional arrest. The suspect's normal activities

[17] A review of the background of the Fourth Amendment reveals that it was not intended to be narrowly construed. (See *Henry v. United States*, *supra*, 361 U.S. 98, and *Draper v. United States*, 358 U.S. 307, (1959) (dissenting opinion of Mr. Justice Douglas, 70 S.Ct. 336-337).)

have been summarily interrupted. He is subject to search, to questioning which may be unreasonable in intensity precisely because it is limited in time, and to all else that may transpire behind the closed doors of the police station. It was the protection of the citizen against whom there was no showing of probable cause from just such consequences that motivated the adoption of the fourth amendment, and the Uniform Act's play on words does not advance us toward a solution of the constitutional problem.

> Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 16, 37-38 (1957).

The Government's attempt to justify its position in terms of more recent authorities is likewise unavailing.

First of all, while temporary detention may be authorized by statute in a few states, there is no such statute in California, while the very fact that such statutes were found necessary implies that such detention was not authorized at common law. Furthermore, while the wisdom and even the validity of such statutes is not before the Court, it is important to note that such statutes impose time limits on the detention which they authorize and define the circumstances under which detention may be permitted, whereas the non-statutory detention which the Government is urging would lead to an amorphous, undefinable and practically unlimited right of detention without any standards for judicial supervision.[12]

---

[12] Moreover, the constitutionality of the Uniform Arrest Act, upon which such statutes are patterned, has been seriously questioned. See Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 38-39, where the author observes:

". . . In both *Carroll v. United States* and *Brinegar* v. *United States*, the Court decided that the validity of a search without a

The cases cited by the Government are readily distinguishable from the case at bar.

In *Poulas* v. *United States*, 95 F.2d 412 (C.C.A.9, 1938), police had been advised that defendant was about to transport bootleg liquor in a certain automobile and were on the lookout for it. Police approached defendant, who was in a parked automobile, asked what he was carrying and he replied "moonshine."

---

warrant depended upon the existence of probable cause. The Court in *Carroll* was emphatic that 'it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons . . . to the inconvenience and indignity of such a search.' Both of these cases involved bootleggers, and in sustaining the searches they appear to represent the outer limits of 'probable cause for believing' that the specific vehicle to be searched carried contraband. In both cases the facts were that (1) the person to be searched was known to the officer as one who 'recently and repeatedly has given substantial ground for believing that he is engaging' in illegal transportation, *and* (2) the circumstances at the time of arrest furnished reasonable grounds of suspicion, that is, a heavily loaded vehicle coming into dry territory from a source of supply of liquor.

"The detention provision of the Uniform Arrest Act requires at most only the second of the elements of probable cause laid down in moving vehicle search cases. An officer may stop and question 'any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime,' and to imprison for up to two hours anyone so questioned who 'fails to identify himself *or explain his actions to the satisfaction of the officer*.' (Emphasis added.) The test of 'reasonable ground to suspect' poses semantic and practical difficulties. The Court has repeatedly held that 'mere suspicion' is inadequate ground for a search and has noted that determination of the line 'between mere suspicion and probable cause' is 'troublesome.' It is difficult to see how the courts could administer an act requiring a distinction between 'mere' suspicion and 'reasonable ground to suspect,' which lends force to the observation of the Court that *allowing anything less than probable cause as justification for a search 'would be to leave the law-abiding citizen at the mercy of the officers' whim or caprice.'*" (Emphasis added.)

In *Carter* v. *United States*, 231 F.2d 232 (C.A.5, 1956) police[9] found defendant, who was known to be in the lottery business, at the scene of a search then in progress with respect to a lottery operation. The car was stopped on a parking lot and upon opening the door they observed a brown sack similar to that used by others in the lottery operation; defendant then drove off.

Baines v. *Brady*, 122 Cal. App. 2d Supp. 957, 265 P.2d 194 (1953), an action for false imprisonment, is actually authority for defendant. In that case police saw X committing an assault with a knife in a pool hall and were about to arrest him, when plaintiff entered. The police took plaintiff along for questioning with respect to the assault, but released him shortly afterward. The court held that the police action constituted false imprisonment even without a formal arrest.

In *Hargus* v. *State*, 58 Okla. Cr. 301, 54 P.2d 211, defendant, an ex-convict, acted suspiciously in and about a drug-store as though he were contemplating a hold-up. Police walked up to defendant's car, at which point defendant, after making certain threats, killed one of the police officers. In rejecting the defendant's claim of self-defense, the court held that a police officer has a right to question a person without being shot.

Long v. *Ansell*, 69 F.2d 386 (C.A.D.C. 1933), is authority for defendant rather than the Government. In the *Ansell* case, *supra*, the court, in holding that service of civil process did not constitute an arrest within the constitutional exemption from arrest of United States Senators under Article 1, Section 6, gave the following broad definition of arrest (69 F.2d 389):

---

[9] The term "police" is used in this brief to describe the law enforcement officers who conducted the searches and seizures in the various cases cited, regardless of the technical appellation of the particular law enforcement officer involved.

> ". . . the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time. . . ."

The facts leading to the investigation in *Brinegar* v. *United States*, 338 U.S. 160, (1949), are far different than those in the instant case. (See Pet. Op. Br., pp. 2-9.) Thus, the Court in *Brinegar* observes with respect to the police conduct involved (69 S.Ct. 1306):

> ". . . before stopping the car or starting to pursue it they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings. Finally, each driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure."

Smith v. *United States*, 264 F.2d 469 (C.A.8, 1959), is likewise readily distinguishable from the instant case. In the *Smith* case, *supra*, a police roadblock stopped defendant's car after police had been advised that defendant had stopped at a store where illegal liquor was supplied and gone in and out of the garage there. The agents observed that the automobile had overload springs and appeared weighted down, and that although the body of the car was dirty it was carrying a clean Missouri license plate.[20]

---

[20] The Court expressly declared that an automobile may not be stopped on mere suspicion, observing (26 F.2d 472):

"There must, of course, exist a ground and basis for a federal officer to engage in stopping a car on a highway. Alcohol Tax Unit agents are not free to make general or capricious interceptions of motorists. Elements must be present, of which the agents

McCarthy v. *United States*, 264 F.2d 473 (C.A.8, 1959), involved facts similar to *Smith* v. *United States*, *supra*. In addition it appeared that the defendant's car went off the highway and subsequently returned thereto as though attempting to disguise defendant's route.

In *Fowler* v. *United States*, 239 F.2d 93 (C.A.10, 1956), the police had been informed that certain premises were being used in connection with illicit liquor operations. They observed an automobile being loaded with cartons at the premises in question and later stopped defendants, who were reputed to be bootleggers, whereupon defendants admitted they were transporting liquor.

In *Gilliam* v. *United States*, 189 F.2d 321 (C.A.6, 1951), the police had been advised that defendant, a known bootlegger, was picking up a load of whiskey in a certain automobile in a known moonshining district. The police then followed the automobile in question, overtook and stopped it, and questioned defendant. Judge McAllister dissented, observing (189 F.2d 324-325):

> "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from regular modes of procedure. 'This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.' Boyd v. United States, 116

---

have information or knowledge, connected with the car itself, or with the driver, or with the context given the car and driver by some special scene or setting, which can reasonably impress, beyond a mere suspicion, that the motorist is not 'going about ordinary affairs' but is presumably engaged in using the car for improper alcohol-purpose. . . ."

U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746. Probable cause to arrest or search is measured by the knowledge of the arresting officer, not by his intent. It means probable cause known to him at the time of the arrest. But the standard applied to his consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did. See Director General of Railroads v. Kastenbaum, 263 U.S. 25, 27, 44 S.Ct. 52, 68 L.Ed. 146; Wisniewski v. United States, 6 Cir., 47 F.2d 825. It follows that an arrest or search without a warrant cannot be justified on the ground that the fruits of the search justified the conclusion that the officer's knowledge at the time of the arrest gave him grounds therefor. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210. If the information at the disposal of an arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case with an invalid warrant, or with no warrant at all, would be an illegal arrest. . . . "[21]

---

[21] The remaining cases cited by the Government are likewise out of point.

The facts in *Weathersbee* v. *United States*, 62 F.2d 822 (C.C.A.5, 1933), are not set forth in detail, except insofar as it appears that government agents asked what was in a package which defendant removed from an automobile and replaced when police approached, to which defendant replied "home brew".

People v. *Seely*, 66 Cal. App. 2d 408, 152 P.2d 454 (1944) was a pre-Cahan case which did not involve any question of search and seizure.

In *People* v. *Smith*, 141 Cal. App. 2d 399, 296 P.2d 913 (1956), defendant was interviewed by police as a witness to a traffic violation. Police observed needle marks on the arms of defendant's companion and asked defendant if he was a user. He replied that he was and voluntarily showed needle marks, whereupon he was arrested.

In *People* v. *Michael*, 45 Cal. 2d 751, 290 P.2d 852 (1955), police were admitted to defendant's home by consent and asked if any narcotics were present, whereupon defendant and her mother produced some and turned them over to the police. It was held that the evidence was obtained by consent.

B. The Government's "Right to Detain" Theory Is Unsound From a Policy Standpoint.

Aside from the lack of precedent for the Government's position, it is submitted that the theory of detention without probable cause which the Government is urging here is unsound from a policy standpoint.

In *People* v. *Jaquez*, 142 Cal. App. 2d 555, 298 P.2d 896 (1956), a pedestrian, who was a known narcotics dealer, was asked about the "habit" and voluntarily showed his arms to the police. They contained needle marks indicating injections and defendant was arrested.

Gisske v. *Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908), (a pre-Cahan action) was a false imprisonment case in which a uniformed police officer investigating a robbery and burglary in the area stopped a pedestrian who refused to answer questions but agreed to go to the police station instead. The court indicated that even if a formal arrest were deemed to have been made it would not have been unlawful.

In *State* v. *Gulczynski*, 32 Del. 120, 125 Atl. 88 (1922), police, who had been informed that defendant had bootleg liquor, walked up to defendant on the street and asked what he had in a package, to which defendant replied that he had liquor.

People v. *Henneman*, 367 Ill. 151, 10 N.E. 2d 649 (1937), is actually authority for defendant. Police were informed that two suspicious characters were riding in a car on a certain street, saw two men sitting in a car parked at the curb on the street in question, arrested defendant and found guns in the car. *The court held the arrest and search and seizure unlawful.*

In *Campbell* v. *Commonwealth*, 203 Ky. 151, 261 S.W. 1107 (1924), police were informed that defendant had moonshine and was coming to X mining camp. They went to the mining camp and found defendant and a companion there with objects apparently concealed in their clothing which appeared to be the size of the jars used to carry moonshine. Defendant's dress appeared damp at the point where she appeared to conceal the package. Police asked them what they were carrying and they replied they were carrying moonshine.

In *Johnson* v. *State*, 118 Tex. Cr. 293, 42 S.W. 2d 421 (1931), defendant, a pedestrian walking along the street carrying a package, was stopped by the police. It appeared that the police had been looking for defendant, who was a suspected bootlegger, and upon seeing defendant asked what he had in the package, to which defendant replied that he had whiskey.

In *Pena* v. *State*, 111 Tex. Cr. 218, 12 S.W. 2d 1015 (1929), defendant stepped off a train carrying a suitcase, and stayed in the

First of all, the Government's suggested standard of "a slight basis for reasonable suspicion," rather than probable cause, as a basis for detention is so vague as to be practically meaningless and would present insuperable problems of judicial supervision. Moreover, insofar as the proposed

---

shadows. Police observed defendant walking along, stopped him and asked what he was carrying, to which he replied that he had liquor.

In *State* v. *Zupan*, 155 Wash. 80, 283 Pac. 671, police, who had been informed that bootleg whiskey was to be delivered at a certain hotel, observed defendant pacing in front of the hotel. Subsequently, an automobile drove up to the hotel entrance, whereupon defendant hurried over to it, took a suitcase and hurried into the hotel. Police went to apprehend defendant and recognized him as a prior offender.

Green v. *United States*, 259 F.2d 180 (C.A.D.C. 1958), involved a pedestrian in the company of a known addict, who fled when called to by the police.

In *Ellis* v. *United States*, 264 F.2d 372 (C.A.D.C. 1959), defendant, a pedestrian, fit the description of a suspect in a series of crimes and was questioned by the police.

In *Morton* v. *United States*, 147 F.2d 28 (C.A.D.C. 1945), police were investigating a murder in which defendant had been identified as a suspect. Their conduct was held to constitute an arrest, thereby supporting a search and seizure made in connection therewith.

Restatement of Torts, Section 112, cited by the Government, is actually authority for defendant. That Section expressly provides that an arrest is not confined to holding one to answer for a crime but likewise includes conduct otherwise directed at securing the administration of the laws. In Comment (c) the author notes that an arrest is not limited to detention for purposes of bringing defendant to court but that that is merely one of the recognized purposes of an arrest.

In *Lawson* v. *United States*, 254 F.2d 706 (C.A.8, 1958), defendant's car was stopped at a liquor store which was suspected of selling to bootleggers and went through an apparent loading operation. Later the car was seen on the highway apparently loaded, and upon being pursued by the police, fled at high speed. The car was stopped at a police roadblock.

In *Jordan* v. *United States*, 254 F.2d 710 (C.A.8, 1958), the facts which led the police to stop the car are not indicated in the opinion. Since there was no timely motion to suppress, the court did not regard the question of the legality of the search as properly before it.

In *Morgan* v. *United States*, 159 F.2d 85 (C.C.A.10, 1947),

standard may have any content, it would represent the replacement of probable cause by mere suspicion as a basis for police detention—a practice more consonant with totalitarian dictatorship than with constitutional democracy.[22]

---

police had been advised by an informer that the car in question was being used for illicit whiskey operations.

In *Lee* v. *United States*, 221 F.2d 29 (C.A.D.C. 1954), certain jewelry had recently been taken from a murder scene and defendant subsequently was found selling jewelry at night from an automobile.

In *Jenkins* v. *United States*, 161 F.2d 99 (C.C.A.10, 1947), the police had been informed of past liquor law violations by defendant and that a violation was then in progress and observed a truck parked at the home of another known illicit liquor dealer.

[22] "First of all, it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."

Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Georgetown L.Jour. 1, 22 (1958).

In light of the foregoing considerations, the courts have steadfastly held that mere suspicion is not sufficient to warrant detention. See, *e.g.*, *Cervantes* v. *United States*, 263 F.2d 800 (C.A.9, 1959); *Bynum* v. *United States*, 262 F.2d 465 (C.A.D.C. 1958); *People* v. *Schraier*, 141 Cal. App. 2d 600, 297 P.2d 81 (1956).

Lest it be urged that different considerations should obtain where one is accosted outside his home, we believe the following observations from a recent article on the subject are apropos:

> " . . . The police problem of arrest on suspicion largely concerns those found abroad on the streets, and we must consider the possibility that the 'privacy' referred to in Wolf v. Colorado would not be held applicable in such a situation. Merely to state such a proposition, however, demonstrates its unreality. The core of the right to privacy is the protection of the integrity of the individual, and if the home is to be inviolate against unreasonable searches, it is because this is one way of protecting that integrity. No one stays in his home all or even most of the time, and one does not leave one's right of privacy behind merely because one steps out of doors. Freedom on the streets also has a high place in our constitutional order of things: 'Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . secured by the Fourteenth Amendment. . . .'
>
> "It would seem unlikely that a court which gives due process protection to the right of privacy in one's home, office or automobile would deny that same protection to an individual merely because he is seized beyond the confines of such a shelter. . . ."
>
> Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 16, 41-42 (1957).

It must be remembered that the police can be expected to push any standard adopted to its limits and beyond.[23]

[23] See, *Brinegar* v. *United States*, 338 U.S. 160 (1949), dissenting opinion of Mr. Justice Jackson.

Even the standard of probable cause has taxed judicial supervision to the utmost. Dilution of that standard to one of reasonable suspicion, as suggested by the Government, would leave the police unfettered by any effective restraint.

But, says the Government, the right of detention which it is urging would result in mere "minor inconvenience to the citizen" (Gov't. Br. p. 11), whereas the lack of such power would make police work more difficult. The answer to this contention is, we believe, twofold. First of all, permitting the police arbitrarily to detain citizens would go far beyond a mere "minor inconvenience." Secondly, while the enforcement of our constitutional safeguards may well make police work more difficult, that is the price which the framers of the Bill of Rights were willing to pay for the preservation of our constitutional democracy, and we believe the course of history has proven their choice a wise one. Furthermore, we do not believe that the requirements of crime prevention and detention necessitate any such right of detention on suspicion. Heretofore this Court has never acknowledged such a right, yet police work has not suffered unduly as a result.

As one writer has recently observed (Foote, *Law and Police Practice: Safeguards in the Law of Arrest, supra*, 52 N.W. L.Rev. 16, 43-44):

> "The extent to which the police today may feel free to operate outside the law without fear of reprisal may be indicated by the fact that not one of the 32 police reports examined in connection with this article raised any questions about police work being handicapped by the restrictions of the law of arrest. The reports were filled with complaint about poor pay and long hours, or inadequate manpower and facilities, or the need for better public cooperation. There was not one complaint, however about fears lest officers be deterred

from their duty due to threats of suits for false imprisonment or other forms of discipline. This suggests the abstract and theoretical position of those who feel it necessary to change the law of arrest in order to unshackle the police. The police are more practical and know that they are already unshackled. What emerges is that the pressing problem in police law today is how to enforce whatever limits on arrest we may determine to be both reasonable and constitutional. . . .

" . . . the most tenable hypotheses would appear to be that the practice of arrest on suspicion is widespread; that the high proportion of releases without charge indicates arbitrary and capricious police administration of the practice; that the resulting invasion of liberty may be substantial, particularly as regards certain classes or races of persons and in certain areas of our large cities; that tolerance of arrest on suspicion invites the inefficient and undesirable practice of harassment as a substitute for the solution of crime and apprehension of criminals; . . . Most important of all, the evidence suggests that the supposed dichotomy between police needs and individual rights may be unreal, and that police needs might be best served by scrupulous observance of the restrictions of the present law of arrest in order to break 'the vicious circle of lawless enforcement and popular distrust.'"

C. The Police Conduct in the Instant Case Was Improper in Any Event.

We have heretofore pointed out wherein the Government's "right to detain" theory is untenable.

However, even assuming, *arguendo*, that such a right to detain were established, it could not authorize the conduct of the police in the instant case.

First of all, as heretofore noted, the defendant in the instant case was apprehended in a moving vehicle while temporarily stopped for a traffic signal, conduct far different than the casual questioning to which the Government alludes.

Second, the police here were not in the course of investigating a specific crime, as was true in the illustrations cited by the Government. In fact, the conduct of the defendant at First and Flower, which even the Government concedes did not constitute probable cause, would not even have afforded a basis for any reasonable suspicion.[24]

---

[24] If the standard of "reasonable suspicion" which the Government is proposing may be so easily satisfied, it poses an even greater threat to civil liberties than that which we have heretofore been describing. Compare *Price* v. *United States*, 262 F.2d 684, (C.A.10, 1959).

The authorities cited by the Government do not suggest a contrary result.

People v. *Perry*, 79 Cal. App. 2d Supp. 906, 180 P.2d 465 (1947), was a pre-Cahan decision holding that the police can arrest without a warrant for a misdemeanor committed in the officer's presence.

The provisions of the *California Penal Code* cited by the Government are not in point here. *Penal Code*, Section 15, defines crimes, and Section 17, distinguishes between felonies and misdemeanors. Section 817 defines police officers, but there is no question as to the status of the police in the instant case. Finally, Section 697, which defines crime prevention, makes no reference whatever to police conduct of the type involved in the instant case.

(*People* v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956), cited by the Government, is discussed in Petitioner's Opening Brief at page 36.)

IV.

The Search and Seizure in the Instant Case Cannot Be Justified on an Abandonment Theory.

The Government's theory that the narcotics seized by the state police had been abandoned by defendant assumes that the officers' prior activities were *lawful*. Since those activities were in fact *unlawful*, this theory need not be considered at length here. In point of fact, however, the evidence in question was not abandoned by defendant.

Abandonment implies a voluntary act, whereas in the instant case the police employed the threat of force in order to compel defendant to attempt to dispose of the evidence. This can hardly constitute an "abandonment" in the true sense of that term.

See,

Badillo v. *Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956),

Gascon v. *Superior Court*, 169 Cal. App. 2d 356, 337 P.2d 201 (1959).

Thus, in *Badillo* v. *Superior Court, supra*, the court states (46 Cal. 2d 273):

> "The attorney general contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees. . . ."

Again in *Gascon* v. *Superior Court, supra*, the court observes (169 Cal. App. 2d 358, 359):

> "In the present case petitioner's flight was caused by the threat of the officers to illegally search his person which they could, without question, have put into effect, and the discarding by the petitioner of the evidence upon his person was but a product of the threat. We cannot distinguish this case in principle from that of Badillo v. Superior Court, 46 Cal. 2d 269 [294 P.2d 23]. . . ."
>
> "In the cited case as well as in the case at bar, the petitioner was fleeing from the attempted illegal invasion of his constitutional rights (U.S. Const., Fourth Amendment; Cal. Const., art. I, §19), and in each case, during the flight, he attempted to dispose of the evidence which the officers would have obtained had they been able to complete the threatened unlawful act. In each case the evidence, being the product of the illegal acts of the officers, was illegally obtained."

The cases cited by the Government do not suggest a contrary result.

In *Hester* v. *United States*, 265 U.S. 57 (1924), police investigating an informer's tip with respect to a bootlegging operation saw defendant hand X a quart bottle, whereupon an alarm was given. Defendant took a jug from an automobile and fled, with the police following, whereupon defendant dropped the jug and X dropped the bottle, both of which were found to contain whiskey.

Haerr v. *United States*, 240 F.2d 533 (C.A.5, 1957), involved a routine border patrol investigation to determine the citizenship of the occupants of an automobile. The officers making the investigation observed defendant trying to hide certain boxes and inquired as to their contents.

whereupon the automobile drove off. During the ensuing chase the boxes were tossed out of the automobile.

Ellison v. *United States*, 206 F.2d 476 (C.A.D.C. 1953), involved a theft from a store which followed a pattern employed by defendant on an earlier occasion for which police officer X had arrested him. Accordingly, X went to defendant's home to investigate; while on the porch officers observed bottles apparently connected with the crime.

In *Martin* v. *United States*, 155 F.2d 503 (C.C.A.5, 1946), police had been informed that D-1 was engaged in bootlegging on certain premises, whereupon police went to the premises in question and saw defendants drive up and enter a house on the premises. The police then observed defendants argue loudly as to the number of jugs in question after which D-2 took a jug to the car and, upon seeing a light, rolled the jug under the car. The police arrested the defendants and retrieved the jug from under the car. The court held there was no search and seizure by retrieving the jug.

Work v. *United States*, 243 F.2d 660 (C.A.D.C. 1957), is authority for defendant rather than the Government. In that case police went to the home of X, a known addict, opened the door and went in, whereupon they observed defendant walk out and place something in a trash can. Subsequent examination of the can by the police revealed that it contained certain pills. The court, in holding that there was an unreasonable search and seizure, stated that the entering of the home was the beginning of an unreasonable search.

Hobson v. *United States*, 226 F.2d 890 (C.A.8, 1955), is likewise authority for defendant rather than the Government. In that case the police, after demanding admittance to arrest defendant's wife, proceeded to break into

the premises after observing defendant toss a package out of a window. The police did not then know the contents of the package (which in fact contained narcotics). The court explained that the police had forced the tossing of the package and made the following observations pertinent to the instant case (226 F.2d 894):[25]

> "Considering the total atmosphere of the case as directed by United States v. Rabinowitz, supra, we can not separate the throwing of the package from the unlawful search. The defendant's action in throwing the package was not voluntary but was forced by the actions of the officers. That the officers anticipated such a result is evidenced by the fact that they stationed a man in the back yard to receive any person or evidence that might come out. The throwing of the package was directly caused by the action of the officers. Further,

---

[25] The remaining cases cited by the Government are likewise out of point here.

The facts in *Brady* v. *United States*, 148 F.2d 394 (C.C.A.9, 1945), are not detailed in the opinion. The court merely indicates that the wife of one of the defendants dropped a package of narcotics on the floor of a garage as the police approached. The court held there was probable cause under the facts (which are not set forth in full) and that the seizure of the discarded narcotics was proper.

Mason v. *United States*, 257 F.2d 359 (C.A.10, 1958), did not involve a question of search and seizure, but merely the sufficiency of the evidence to sustain a guilty verdict.

In *Zap* v. *United States*, 328 U.S. 624 (1946), defendant was a government contractor who permitted inspection of his books and was thereby held to have waived his right of privacy. Accordingly, a check which an agent obtained from a bookkeeper while making such inspection was held properly admitted.

In *Steele* v. *United States*, 267 U.S. 498 (1925), police, who had a warrant to search a certain building, observed cases stenciled as containing whiskey unloaded at a garage there.

Harris v. *United States*, 331 U.S. 145 (1947), involved an arrest under warrant and a search incident thereto.

(*Carroll* v. *United States*, 267 U.S. 132 (1924), cited by the Government, is discussed in Petitioner's Opening Brief at page 17.)

even after the package was thrown out it remained upon protected premises. Without its seizure and examination it afforded no incriminating evidence."

V.

The Search and Seizure in the Instant Case Cannot Be Justified on a Contraband Theory.

The Government's suggestion that the search and seizure may be justified on the ground that the evidence seized was "contraband" is not deserving of serious consideration.

First of all, as the Government itself recognizes, such a theory presupposes that the police were engaged in *lawful* activity at the time of the search and seizure, thereby assuming the very point at issue here. In point of fact, the taint of illegality infested the entire transaction, and the conduct of the police cannot be justified by the nature of the evidence uncovered. Otherwise, the guarantees contained in the Fourth Amendment would have no meaning.

In analogizing the instant case to one where the police make observations through an open window, the Government ignores the actual facts of record as heretofore summarized. This was not a case where a police officer observed contraband through the window of a parked car. Rather, it is a case where the police followed the defendant for some two miles, overtook the vehicle in which he was riding, surrounded it and compelled him to disgorge the evidence in question.[26]

---

[26] In light of these facts, the cases cited by the Government are out of point.

In *Bell* v. *United States*, 254 F.2d 82 (C.A.D.C. 1958), police saw defendant and X in an automobile that pulled away from a food store and drove two blocks without lights. (An apparent traffic offense.) The police stopped them, asked for their driver's

CONCLUSION

In our opening brief we pointed out wherein the evidence upon which defendant was convicted was obtained as the result of an unlawful search and seizure. The Government has failed to suggest any plausible theory on which

---

licenses and registration cards and flashed a light in the car, whereupon they saw 30 cartons of cigarettes.

In *Fisher* v. *United States*, 205 F.2d 702 (C.A.D.C. 1953), police who had been informed that there was a lottery on certain premises entered a valet shop on the premises by a public entrance and observed numbers paraphernalia through an open door at the rear.

In *United States* v. *Lee*, 274 U.S. 559, 47 S.Ct. 746 (1927), coast-guardsmen used a searchlight to observe liquor on a motor-boat.

In *McQuaid* v. *United States*, 198 F.2d 987 (C.A.D.C. 1952), police went to a second-hand store after being informed that stolen property was located there and asked for certain records required to be kept by second-hand dealers. Before entering they observed certain furniture of the type they were seeking as stolen property. Inside the store the police observed certain new furniture hidden under old furniture.

In *Safarik* v. *United States*, 62 F.2d 892 (C.C.A.8, 1933), the police had been informed that defendant, who had a record as a bootlegger, had liquor in a garage. Later police observed defendant loading a car with cans from a chicken coop on the premises and approached defendant, who thereupon fled.

In *Smith* v. *United States*, 2 F.2d 715 (C.C.A.4, 1924), police were searching certain premises under a warrant when defendant drove up; police observed liquor through the door of the car.

In *Boyd* v. *United States*, 286 Fed. 930 (C.C.A.4, 1923), police approached a parked car while defendant stood on the outside and X was on the inside. As the police approached defendant waved to X who backed the car away. The officers later searched the car and found it to contain whiskey. The court observed that the officers had merely looked inside the car and seen the whiskey, noting (286 Fed. 931):

". . . It is not a search in any legal or colloquial sense for an officer to look into an automobile standing on the road side. . . ."

(The inapplicability of the cases cited by the Government in footnote 15, page 42, is readily apparent from the Government's own comments with respect to those cases.)

that search and seizure can be sustained. Accordingly, we respectfully request once more that the decision below be reversed.

Respectfully submitted,

CLORE WARNE
6535 Wilshire Boulevard
Los Angeles 48, California

HARVEY M. GROSSMAN
Of Counsel

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959
No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF.

CLORE WARNE,
6535 Wilshire Boulevard,
Los Angeles 48, California,
Counsel for Petitioner.

Of Counsel:
HARVEY M. GROSSMAN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Preliminary statement 1

Statement of facts 2

Summary of argument 3

Argument 5

I.

The "silver platter" doctrine has not been adopted by this court 5

II.

Adoption of the "silver platter" doctrine would be irreconcilable with the holding of this court in Wolf v. Colorado 7

III.

The "silver platter" doctrine is unworkable 10

IV.

Application of the "silver platter" doctrine in an "exclusionary rule" state, such as California, would undermine the effectiveness of that state's exclusionary rule, contrary to the common federal-state policy 16

V.

The Government's suggestion of a "flexible standard" in applying the "silver platter" doctrine is unsound 21

Conclusion 25

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Benanti v. United States, 355 U. S. 96	5, 8
Hanna v. United States, 260 F. 2d 723	6
Jones v. United States, 217 F. 2d 381	5
McNabb v. United States, 318 U. S. 332	8
Parker v. United States, 183 F. 2d 268	5
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905	17
United States v. Stirsman, 212 F. 2d 900	5
Wolf v. Colorado, 338 U. S. 25	3, 5, 7, 16, 22

Rules

Federal Rules of Criminal Procedure, Rule 26	20

Statutes

United States Constitution, Fourth Amendment	5, 7
United States Constitution, Fourteenth Amendment	7

Textbooks

49 Journal Crim. L. C. & P. S. (1959), pp. 455, 460, Galler, The Exclusion of Illegal State Evidence in Federal Courts	4
57 Michigan Law Review (1959), p. 766, note	6
43 Minnesota Law Review (1959), pp. 1083 et seq., footnote 271, Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts	6, 7, 9, 12, 13, 14, 15, 18, 20
31 Rocky Mountain Law Review (1959), p. 237, note	6
26 Tennessee Law Review (1959), pp. 332, 351, Way, Exclusion of Evidence Illegally Obtained	23
3 Washington Law Quarterly (1959), pp. 229, et seq., Kohn, Admissibility in Federal Court of Evidence Illegally Seized by State Officers	6, 14, 23, 24
5 Wayne Law Review (1959), pp. 251, 254, note	22

IN THE

Supreme Court of the United States

October Term, 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF.

Preliminary Statement.[1]

The Brief for the United States in the instant case was confined to the first of the two issues as to which certiorari was granted, *i.e.*, the unlawfulness of the search and seizure, and our initial Reply Brief was likewise confined to that issue.

The Government's contentions with respect to the second issue as to which certiorari was granted here, *i.e.*,

[1]Petitioner's Opening Brief will be designated by the legend "Pet. Op. Br." followed by appropriate page and line numbers; Brief for the United States in *Elkins v. United States*, No. 126, will be designated by the legend "Gov't. Br." followed by appropriate page and line numbers; Petitioner's Reply Brief will be designated by the legend "Pet. Rep. Br." followed by appropriate page and line numbers; petitioner will sometimes herein be designated as "defendant."

the "silver platter" doctrine, are presented in the Government's brief in *Elkins v. United States*, No. 126, this term. (See Brief for United States in *Elkins*, p. 46, footnote 15.) A copy of the latter brief was received by counsel for petitioner Rios on March 21, 1960—after the printing of our initial reply brief—and we are therefore presenting our views with respect to the latter issue by way of a supplemental reply brief.

Statement of Facts.

The facts in the present case have been reviewed at length in our opening and reply briefs and we will not repeat that discussion here. However, a few observations with respect to the facts bearing upon the "silver platter" aspects of the case appear to be in order.

The search and seizure of which defendant complains in the instant case were made by police officers of the State of California, whose courts have adopted the so-called "exclusionary rule," holding evidence obtained by an unlawful search and seizure inadmissible. When the evidence thus obtained by the state police was sought to be introduced in the state courts, it was excluded under the foregoing rule on the ground that it had been unlawfully obtained as the result of an arrest and search without warrant or probable cause. Since the evidence in question constituted the sole evidence of defendant's guilt, a judgment of acquittal was entered.

Finding their efforts thus thwarted by the state exclusionary rule, the state police officers who had conducted

the search and seizure in question, after consulting with their superiors as to the appropriate course of action to be taken, took the case to the federal prosecuting authorities who thereupon instituted further proceedings against defendant arising out of the same facts on which the prior state prosecution had been based. Once again the evidence seized by the state police was offered as the sole evidence of defendant's guilt. This time, however, the evidence was admitted, despite a timely motion to suppress, and on the basis thereof defendant was convicted and sentenced to 20 years imprisonment. In holding the evidence in question admissible, the trial court voiced the view that evidence unlawfully obtained by state officers is admissible in a federal criminal prosecution; the Court of Appeals adhered to similar views.[2]

Summary of Argument.

The final choice of adopting or rejecting the "silver platter" doctrine for the federal courts has yet to be made. It is submitted that that doctrine should be emphatically rejected by this Court.

First of all, adoption of the "silver platter" doctrine would be irreconcilable with the holding of this Court in *Wolf v. Colorado*, 338 U. S. 25 (1949) that every unreasonable state search violates Due Process.

Secondly, application of the "silver platter" doctrine in an "exclusionary rule" state, such as California, would

---

[2]Also certain questions were raised in both courts with respect to the unlawfulness of the search and seizure, a subject dealt with in our opening and reply briefs.

undermine the effectiveness of the state's exclusionary rule, contrary to the common federal-state policy. On the other hand, application of the exclusionary rule under such circumstances would avoid what would otherwise be a gap in the disciplinary effect of the state exclusionary rule, insuring that state police cannot avoid the effect of the local rule by crossing the street to the federal courthouse as was done in the instant case.

Third, aside from its other deficiencies, the "silver platter" doctrine is unworkable because the basic premise on which the doctrine is based—*i.e.*, that the existence of federal-state cooperation can readily be established—is a false one.

Finally, the Government's suggestion of a flexible standard in applying the "silver platter" doctrine is unsound in principle and would present insuperable problems of judicial supervision.

In short, as a recent writer in the field has pointedly observed:

> ". . . The illegal actions on the part of state and federal officers are equally repugnant to the federal constitution and the fruits of their illegal ventures should be treated similarly in the federal courts."
>
> *Galler, The Exclusion of Illegal State Evidence in Federal Courts,* 49 J. Crim. L. C. & P. S. 455, 460 (1959).

ARGUMENT.

I.

The "Silver Platter" Doctrine Has Not Been Adopted by This Court.

Despite the Government's assertions to the contrary, it is submitted that it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment (*Benanti v. United States*, 355 U. S. 96 (1957). (See Pet. Op. Br. p. 40.)

Moreover, while the majority of the lower courts which have passed upon the problem have held such evidence admissible, they have generally done so without considering such crucial factors as the impact of this Court's decision in *Wolf v. Colorado*, 338 U. S. 25 (1949), or the question whether the state involved adheres to the exclusionary rule.

Thus, as one writer in the field recently noted, the court below, in affirming defendant's conviction, "points to three other federal appellate cases sustaining convictions based on 'silver platter' evidence seized by police of exclusionary states: *Jones v. United States*, 217 F. 2d 381 (8th Cir. 1954) (Missouri); *United States v. Stirsman*, 212 F. 2d 900 (7th Cir. 1954) (Indiana); *Parker v. United States*, 183 F. 2d 268 (9th Cir. 1950) (Washington). But none of these opinions ever considers what significance, if any, attaches to the fact that the local police are from an exclusionary state. So far as the opinions reveal, the point was not raised at all." (*Kamisar*,

Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083, footnote 271, 1164-1165, 1959.)[3]

Far more persuasive, we believe, is the thoughtful and well-reasoned opinion of Judge Hastie in *Hanna v. United States,* 260 F. 2d 723 (C. A. D. C., 1958), cited in our opening brief[4]—a decision which has evoked considerable support from commentators in the field.

See, *e.g.,*

Note, 57 Mich. L. R. 766 (1959);

Note, 31 Rocky Mt. L. R. 237 (1959).

In short, the final choice of adopting or rejecting the "silver platter" doctrine for the federal courts has yet to be made. It is submitted that in making that choice, this Court should emphatically reject the "silver platter" doctrine.[5]

---

[3]The Government in the instant case likewise fails to give proper consideration to the fact that California follows the exclusionary rule. (See Point IV, *supra.*)

[4]The Government completely ignores the well-reasoned state court decisions discussed in our opening brief (pp. 40-46) in which the "silver platter" doctrine has been emphatically rejected.

[5]It has been predicted "that the Court will finally resolve the uncertainties of the past by ruling that evidence illegally seized by state agents is inadmissible in federal court." (Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers,* 3 Wash. L. Q. 229, 259-260, (1959).)

II.

Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in Wolf v. Colorado.

The Government's acknowledgement that the decision of this Court in *Wolf v. Colorado, supra,* holding that every unreasonable state search violates due process "weakens" the rationale of the "silver platter" doctrine is a gross understatement. As Professor Kamisar has observed, the *Wolf* case strikes "at the very heart of the 'silver platter' exception. . . ." (Kamisar, *op. cit.*, 43 Minn. L. R. 1197.)

In light of *Wolf*, the Government's suggestion that an unlawful search and seizure by state police may be likened to seizure of evidence by private individuals is obviously unsound. Where the search and seizure is conducted under the auspices of the state, there is, under the holding in *Wolf*, an invasion of the defendant's constitutional rights; no such invasion is involved where the conduct in question is that of private individuals whose acts and conduct, unlike that of state officers, need not conform to the requirements of Due Process.[6]

---

[6]The Government's suggestion that a search and seizure which is in violation of the Fourth Amendment may nevertheless be sanctioned by the Fourteenth Amendment is irreconcilable with this Court's holding in *Wolf*, in which the Fourth Amendment's guarantee against unreasonable searches and seizures was held to be implicit in "the concept of ordered liberty" and hence enforceable against the states through the Due Process Clause.

Moreover, as Professor Kamisar has observed,[7] the "silver platter" doctrine is likewise contrary to the rationale of *McNabb v. United States*, 318 U. S. 332 (1942):[8]

> "The begrudging reception currently accorded claims of federal-state collaboration in illegal searches, a reception all the more ominous in the face of modern hand-in-hand federal and state law enforcement, demonstrates that there is much to be said for McNabb-type treatment in this area, too. It demonstrates that the 'silver platter' doctrine (a) raises evidentiary problems, and (b) furnishes temptation to and opportunity for collusion, of the same magnitude as the dangers in prolonged detention which evoked the McNabb rule.
>
> "Hence the proposal that on practical grounds alone the 'silver platter' exception should be wiped out.
>
> "Even if the McNabb line of cases were not on the books, I think this would be far from a revolutionary approach. After all, the intensity of federal-state cooperation in law enforcement is such today that if the liberal approach of the 1930's still pre-

---

[7]Professor Kamisar's article appeared in print after the filing of our opening brief.

[8]The Government's suggestion that *Benanti v. United States*, 355 U. S. 96 (1957) is not analogous to the instant case because the anti-wire tapping statute precludes not merely interception, but also use of the intercepted message, is untenable. The statutory proscription against use of the intercepted message is clearly designed to discourage unlawful interception, just as the exclusionary rule adopted by the federal and California courts is designed to discourage procurement of evidence by unlawful search and seizure; hence the Government's observations tend to support, rather than weaken, petitioner's analogy of the *Benanti* case to our own.

vailed the 'silver platter' rule would retain little significance. In most types of cases, notably those dealing with narcotic violations, the requisite federal participation would invariably be found on the basis of general understandings and practices.

". . . To the extent McNabb rests on a reluctance to debase the administration of federal criminal justice, these considerations would certainly seem to bar the use of *unconstitutionally* seized evidence from the federal courts. To the extent McNabb represents an effort to break through the problems of proof raised by the cry of 'coerced confession,' the evidentiary difficulties raised by the issue of federal-state collaboration in the search and seizure field are no less, if not greater. Finally, to the extent McNabb is designed to remove the considerable temptation to and opportunity for illegal interrogatory practices during illegal detention, the temptation to and opportunity for federal-state collaboration to circumvent the fourth amendment appears to be of the same magnitude and worthy of the same judicial attention in this era of hand-in-hand state and federal law enforcement. In short, McNabb attacks the 'silver platter' doctrine on two fronts; one 'conceptual,' the other 'practical.' Whether the doctrine can emerge unscathed remains to be seen."

Kamisar, *op. cit.*, 43 Minn. L. R. 1194-1198.

III.

The "Silver Platter" Doctrine Is Unworkable.

As pointed out in our opening brief (p. 55), aside from its other deficiencies in terms of logic, precedent and sound policy, the "silver platter" doctrine is simply unworkable because the basic premise on which the doctrine is based—*i.e.*, that the existence of federal-state cooperation can readily be established—is a false one. Thus, as Professor Kamisar has recently observed in a thought-provoking article:

> "Since the days of the 'jolly little prohibition game,' federal authorities have been helping themselves to the servings on the 'silver platter' with some relish. The thirty-five 'silver platter' cases which have reached the federal courts of appeal in the last ten years indicate that, at the very least, the supply has not diminished in recent times . . .
>
> " 'Off the record' talks with several former federal law enforcement officers have convinced me that on a significant number of occasions; (a) pressure to 'get the job done' causes federal agents to arrange for, shall we say, ' "silver platter" raids'; (b) the desire to salvage evidence obtained in the course of a joint federal-state raid, which, in retrospect, appears to be illegally obtained, causes officers to reconstruct a 'silver platter' raid.
>
> ". . .
>
> "The statement most on point that I have come across is one by Thomas E. Dewey, some twenty years ago, to the effect that 'in dozens of cases' in his 'own experience as a Federal prosecutor' he had to rely on the evidence procured by the unhampered

police of the State of New York.' Worth thinking about, too, is a recent statement to a congressional subcommittee by Assistant Attorney General Warren Olney suggesting that one of the reasons why narcotic cases—

> 'lost or dismissed because of illegal searches do not seem to be numerous may be due to the fact that frequently Federal and local officers work in close cooperation, and the cases, when completed, are presented in the State or Federal court, depending on the nature of the violation, *the manner in which the evidence was acquired*, and the extent of the penalties that can be imposed.'

"Not squarely on point, but quite indicative, I submit, of the 'all's fair in love, war and law enforcement' climate which breeds federal-state collaboration in illegal searches is the recent testimony by a San Francisco district attorney that—

> " 'the district attorney's office has been used very liberally by the Federal agents for their cases which might not necessarily stand the legal test required in a Federal court.
>
> [Prior to Cahan] we had the so-called non-exclusory [sic] rule here whereby we could use any evidence no matter how it was obtained.'

"And the corroboration by his federal counterpart to the effect that—

> " 'the practice was for many years to divert Federal cases, that is, cases which were made as a result of Federal investigation, into the State courts if there were any apparent weaknesses from the evidentiary standpoint.'

"It is now unclear whether evidence illegally seized by federal agents may still be used in the California state courts, but the Ninth Circuit has made it quite clear that evidence illegally seized by California police will still be received in the federal courts. Considering their past use of the federal system to circumvent the protection against unreasonable search and seizure, it is most unlikely that state and federal law enforcement officials in California have overlooked the possibilities opened up by the Ninth Circuit's attitude.

"I think it fair to say that the 'on the record' statements above suggest that the decided cases may represent only a small fraction of the federal-state collaboration which in fact takes place. A point I shall press, perhaps belabor, in the next section is that the temptation to and opportunity for engaging in such activity is very substantial indeed."

Kamisar, *op. cit.*, 43 Minn. L. R. 1083, 1178-1180.

Professor Kamisar goes on to review the facts of numerous search and seizure cases and observes (43 Minn. L. R. 1186-1187):

"Do not such cases as Mills, Bartkus, Papworth, Tupper and Henderson, and the many search and seizure cases discussed in the preceding subsection, strongly suggest that much of the 'separate sovereignties' talk is just so much metaphysical nonsense?

". . .

"I think the cases themselves amply refute the possibility that they constitute isolated instances. For the pattern of federal-state cooperation they manifest is strong and unmistakable."

He concludes (43 Minn. L. R. 1190):

> "'A new system of cooperative federalism has appeared' in criminal-law enforcement, Professor Francis Allen recently commented, 'the full significance of which has not been grasped by the public at large. . . .' Nor, he might have added—so long as the likes of the 'silver platter' doctrine are on the books—by the federal courts in particular."

Such cooperation is clearly in evidence in the instant case, where state police sought to avoid the effect of the state exclusionary rule by crossing the street to the federal courthouse and enlisting the aid of federal authorities.

In light of the foregoing practices, the Government's suggestion that the "silver platter" doctrine "has validity in the realities of our federal system" (Govt. Br. p. 59) is itself unrealistic. Equally unrealistic is the Government's suggestion that all the accused need do under the "silver platter" doctrine is establish the existence of federal-state cooperation in a given case, for the broad patterns of cooperation just discussed are not readily susceptible to proof.[9] As Professor Kamisar has aptly observed (43 Minn. L. R. 1191-1192):

> "What, then, is to be said about the safeguards upon which the 'silver platter' doctrine depends, when the accused quite possibly does not even *suspect* pre-raid, federal-state activities, or, if he does, quite likely was not even *present* when federal and local police met or otherwise communicated with each other? When the accused, therefore, often does not

---

[9]Efforts of defense counsel in the instant case to establish such a pattern of cooperation were restricted by the Court. (See Pet. Op. Br. footnote 24, p. 55.)

have so much as 'his word against theirs'? Or in the unlikely event that he does, cannot so much as point to marks or bruises to substantiate his version?

"Assume that the requisite federal participation did in fact occur in a particular case, but that the government denies it? Is it an exaggeration to say that frequently, if not typically, about all the accused can do under the circumstances is pray that the officers' testimony turns out to be inherently unbelievable or disturbingly inconsistent?"

Moreover, adoption of the "silver platter" doctrine would not interfere with effective federal law enforcement as the Government suggests. On the contrary, rejection of that doctrine would assist in raising law enforcement standards by diverting the patterns of federal-state cooperation which we have been reviewing into constructive channels.

See, *e.g.*,

Kohn, *op. cit.*, 3 Wash. L. Q. 229, 253, 255;

Kamisar, *op. cit.*, 43 Minn. L. Rev. 1083, 1195-1196.

Thus, as one writer has recently noted (Kohn, *op. cit.*, 3 Wash. L. Q. 253-255):

"It would seem, however, that exclusion in federal court of evidence illegally seized by state officers would encourage the federal executive branch to take steps to discourage such illegal activity. . . .

"This definite interest of the federal government in state law enforcement techniques would naturally incline it to encourage states to improve their law enforcement methods. Close cooperation between fed-

eral and state police would facilitate such encouragement and it is notable that such cooperation has existed in the past and exists today in an increasing degree. . . .

"Close federal and state cooperation is not the only method available to the federal government to control state investigative techniques. A correlative method is to call to the attention of state agents the but-rarely-invoked Civil Rights Act, . . .

"It is therefore submitted that a decision excluding in federal court evidence illegally seized by state officers would probably help deter future illegal activity by state officers because federal officials could make successful use of methods available to them to discourage state agents from engaging in illegal searches and seizures. At the very least, any existing tacit, but unprovable, encouragement by federal officers of this illegal state activity would be eliminated."

Again, Professor Kamisar observes (43 Minn. L. Rev. 1195-1196):

"The 'silver platter' rule has been productive of much controversy. Controversy both over the requisite degree of federal participation generally, and the degree actually involved in the particular case. Under such circumstances, when the rule itself is debatable there is something to be said for an alternative which presents little or no opportunity for dispute in its application.

"But there is much more to be said for dispensing with the 'silver platter' rule than economy of time and energy. Where formerly federal agents might condone, if not invite, lawless methods by state of-

ficers working with them, there would now be a strong incentive to discourage such misconduct. 'Of course, cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism . . . can indeed profit the Nation and the States,' but where formerly federal agents were sorely tempted to exploit this close cooperation to circumvent the rules, such a state of affairs would now be a force *for*, not *against*, individual liberties.

"That, at least, is the theory. And a theory we should put into operation. . . ."

IV.

Application of the "Silver Platter" Doctrine in an "Exclusionary Rule" State, Such as California, Would Undermine the Effectiveness of That State's Exclusionary Rule, Contrary to the Common Federal-State Policy.

The Government deals hardly at all with what we believe to be one of the most basic issues presented to the Court in the instant case, namely, the effect of the "silver platter" doctrine on states such as California which have adopted the exclusionary rule.

The Government's suggestion that "a disciplinary rule to control state officers is no more needed . . . in federal courts than in state courts." (Govt. Br. 21-22) encompasses the thought that where the state courts have found the exclusionary rule to be necessary, the federal courts should adopt a like rule. Thus, while this Court recognized in *Wolf* that sanctions other than the exclusionary rule—such as the effect of public opinion—may be effective in some states to deter unreasonable

searches and seizures, this has not been the case in California, whose adoption of the exclusionary rule was necessitated by repeated flagrant violations of the constitutional mandate by local law enforcement officers. (See Pet. Op. Br. Appendix B.)

Insofar as *Elkins v. United States* (No. 126 This Term), is concerned, the Government's minimal treatment of this problem may perhaps be traced to the Government's assertion that the state involved—Oregon—has not adopted the exclusionary rule. (See Govt. Br. p. 64.) In California our Supreme Court has adopted the exclusionary rule; of this there can be no doubt. (See *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).)

In the context of a state, such as California, which has adopted the exclusionary rule, the Government's attempted justification of the "silver platter" doctrine appears to be completely devoid of substance.

The Government's argument is essentially as follows:

1. The principal purpose of the exclusionary rule is to deter unlawful searches and seizures.

2. Application of the exclusionary rule by a federal court to state officers will not have such a deterrent effect because such officers will not be deterred from such activities in their enforcement of state law.

3. Since application of the exclusionary rule to state officers will have no disciplinary effect, such application would merely involve undue embarrassment to federal law enforcement and is therefore undesirable.

It is obvious that the foregoing reasoning can have no validity insofar as an exclusionary state is concerned, for in such a state *application of the exclusionary rule to state officers in the federal courts complements a like*

application in the state courts, thereby avoiding what would otherwise be a gap in the disciplinary effect of the state exclusionary rule by insuring that state police cannot avoid the effect of the local rule by crossing the street to the federal courthouse, as was done in the instant case. Conversely, application of the "silver platter" doctrine in an exclusionary state, such as California, tends to defeat and undermine the disciplinary effect of the exclusionary rule by offering to state officers a ready market for the fruits of their unlawful enterprises.

The second argument which the Government advances in support of the "silver platter" doctrine—namely, that it prevents undue federal interference with the administration of justice at the state level—can likewise have no application to an exclusionary state. Where the state courts have adopted the exclusionary rule, refusal of the federal courts to receive evidence unlawfully obtained by state officers serves to further the common federal-state policy, while application of the "silver platter" doctrine in such circumstances tends to undermine the efforts of the state courts in furtherance of that policy.[10]

As Professor Kamisar pointedly observes:

> ". . . twenty-one states now follow the federal exclusionary rule. When evidence illegally seized by the police of *these* states finds its way into the federal courts and defendant moves to invoke the federal exclusionary rule it is difficult to see how the prosecutor can so much as mutter 'Why?' And if he does, he will be met with a resounding 'Why not?'

---

[10]Federal application of the exclusionary rule to evidence unlawfully obtained by state officers would avoid the necessity for injunctive action and the unseemly conflicts resulting therefrom, such as occurred in *Elkins v. United States* (No. 126, this term).

"Why not, indeed? On such an occasion, the federal courts are not 'wasting' the rule, as might be regarded the case when the police who seized the evidence hail from a nonexclusionary jurisdiction. Rather, they are rounding out the state practice, they are reinforcing and implementing state policy.

. . .

"'The force of the first holding in Wolf that an unreasonable search violates due process was diminished so as not 'to preclude the varying solutions which spring from an allowable range of judgment.' But how can or why should the force of that holding be diminished when the judgment of the applicable state is that 'the varying solutions' acceptable to Colorado and other admissibility jurisdictions are inadequate if not illusory? When the courts of the applicable state have concluded that the only real solution is the federal of exclusion?

"If 'it is not for [the Supreme Court] to condemn . . . a State's reliance upon other methods' than exclusion, is it for the Supreme Court to thwart to any appreciable extent the State which chooses to rely on the method of exclusion? Does not the Court do so when it authorizes federal courts to receive in evidence the fruits of state illegality, considering, as we must, the great extent to which state and federal crime legislation overlap? How meaningful, how effective, can a state's adoption of the exclusionary rule be when after its courts have branded an arresting officer's conduct illegal and thrown out the evidence seized incident thereto, that *very same officer* need only go to the federal authorities to convict his man on the *very same* evidence?

"When a federal court is confronted with evidence seized illegally by the police of an exclusionary state, the evidence should be banned, it has been suggested, as a matter of 'comity.' I think there is a more compelling reason: fifth amendment due process forbids the use of such evidence in a federal prosecution. That is, I find controlling the first holding in Wolf—an unreasonable search violates due process—a holding herein unimpeded by the considerations which led to the second holding in Wolf. Indeed, a holding herein reinforced by these very considerations. For to admit the evidence in this situation would be not only to disregard the value judgments which led to the first Wolf holding but the considerations of federalism which led to the second.

"Of course, the Court need not reach the constitutional question. It can readily arrive at the same result for essentially the same reasons by exercising its supervisory powers over the administration of criminal justice in the federal courts.

"The foregoing is said with the full realization that the lower federal courts have consistently gone the other way. Indeed, this is my reason for dwelling on a point which seems rather obvious."

Kamisar, *op. cit.*,[11] 43 Minn L. Rev. 1160-1164.

---

[11]The Government's reliance upon Rule 26 of the Federal Rules of Criminal Procedure, relating to a uniform body of rules of evidence in federal criminal trials is misplaced, for that rule is actually authority for defendant. Thus, as Professor Kamisar notes (43 Minn. L. Rev., Footnote 268, pages 1162-1163):

"Rule 26 of the Federal Rules of Criminal Procedure apparently was designed to create 'a uniform body of rules of evidence to govern in criminal trials in the Federal courts.' Advisory Committee Notes to Fed. R. Crim. P. 26(a). Parsons sees this as a 'possible obstacle' to his proposal that

V.

The Government's Suggestion of a "Flexible Standard" in Applying the "Silver Platter" Doctrine Is Unsound.

Apparently recognizing the theoretical difficulties involved in sustaining the "silver platter" doctrine, the Government suggests that in the event the Court does not see fit to accept the doctrine completely, it should nevertheless adopt a rule under which evidence unlawfully seized by state officers would be excluded only where those officers were guilty of a flagrant and intentional disregard of the constitutional mandate. It is submitted that such an approach would be objectionable on several grounds.

First of all, no reasonable basis exists for applying a more limited exclusionary rule in the case of state officers

---

federal courts bar 'silver platter' evidence when the police of an exclusionary state are involved, but otherwise continue to admit it. Parsons, supra at 364-66. He concludes that his proposal is possible under the present rule 26 because it 'was obviously not drafted with search and seizure rules in mind which were supposedly covered by another rule [41]' and because the state policies involved in search and seizure are more serious and more directly affect state citizens than do those involved in the traditional privileges. Id. at 366.

"I think the short answer is that if rule 26 is an obstacle to Parsons' proposal it is also an obstacle to the whole 'silver-platter' doctrine. For, as noted by Galler, The Exclusion of Illegal State Evidence in Federal Courts, 49 J. Crim. L., C. & P.S. 455, 458 (1959), so long as that doctrine holds sway there is no 'uniform' treatment of illegally seized evidence in federal criminal trials. Presently, there is one rule for federally-seized evidence, another for state-seized. Apparently, then, in search and seizure cases the federal courts can take cognizance of distinct types of fact situations other than those which bear on the legality or illegality of the search itself, *e.g.*, the jurisdiction from which the searching police hail. Is this not all that Parsons asks?"

than that applied in the case of federal officers. As one writer has recently observed:

> ". . . The determination of admissibility should not rest upon the basis of who has conducted the illegal search but, rather, upon the desirability of admitting any evidence so procured into a federal court proceeding. If the reasoning of the Weeks case is to prevail, it does not follow that a federal court may admit and consider evidence illegally seized by state officials, but that a federal agency, having illegally seized evidence, could not introduce it in the very same trial. Federal judicial power should not be lent to making fruitful an activity which is denied to federal governmental power—specifically, the admission of illegally seized evidence. . . ."
>
> Note, 5 Wayne L. Rev. 251, 254 (1959).

In suggesting that such disparate treatment is justified, the Government relies on the very principle that it urges in support of the "silver platter" doctrine, namely, that exclusion of evidence obtained by state officers would not have the desired disciplinary effect and therefore is not entitled to the same unqualified acceptance as the rule excluding evidence unlawfully obtained by federal officers. The fallacy of this premise when applied to an exclusionary state, such as California, has already been demonstrated (see Point IV, *supra.*).

A second objection to the Government's proposed standard is that it minimizes the importance of the Fourth Amendment's guarantee against unreasonable searches and seizures which, as noted in *Wolf*, are implicit in the concept of ordered liberty. To suggest that a search and seizure which violates the constitutional mandate may be

a comparatively "minor" matter is to ignore the importance of the constitutional guarantee. Moreover, there would appear to be no greater reason for categorizing unlawful searches and seizures where state officers are involved than there is in the case of federal officers, yet the exclusionary rule adopted for the latter makes no such "good faith" exception as the Government urges.[12]

---

[12]In Appendices to our opening brief, we set forth various observations of courts and writers relating to the importance of the exclusionary rule. The following quoted from articles not then available should be added to those therein cited.

"It has been argued that the exclusionary rule may lead to the release of the guilty but this argument has been answered by the observation that it amounts to nothing more than an assertion that the ends justify the means. Moreover, if the police had obeyed the law in the first instance and had not committed the illegal search and seizure, there would be no evidence upon which to base a prosecution and conviction. Thus, suppression of the tainted evidence merely returns affairs to the status quo existing prior to the unlawful police intrusion; it does not prevent a conviction which would have occurred had the police acted legally."

. . .

"The California example illustrates that, given political morality in the community and a tradition in the police force of respect for law, it is not far-fetched for courts to expect that a rule of exclusion will help deter illegal searches. . . ."

Kohn, *op. cit.*, 3 Wash. L. Q. 229, 247, 252.

"In the final analysis, all of the objections to the Weeks rule can be answered by one statement and that is, it is the only practical solution presently available which will discourage violations of the Fourth Amendment. Other solutions theoretically would be more desirable. This is particularly true of tort liability. This later [*sic*] solution would allow, if the person aggrieved was actually guilty of a crime, for both guilty parties to be punished. For reasons discussed above, this solution would not in practice, even if a proper statute existed, be a satisfactory remedy. Such a remedy asks the individual to stake too much and to take too great a risk in the hope of compensating for the invasion of his privacy. The same can be said of criminal liability—it is too little to late for the aggrieved party. . . ."

Way, *Exclusion of Evidence Illegally Obtained*, 26 Tenn. L. Rev. 332, 351 (1959).

Finally, it is submitted that the "flexible standard" which the Government suggests would present insuperable problems of judicial supervision. For example, how is one to determine whether the police officer in a given case was acting in "good faith?" Again, if the Government be correct in its assertion that the exclusionary rule is designed as a disciplinary measure, how can such discipline be maintained when the officers involved are told that they may violate the law as long as they do not do so in too flagrant a manner? In short, the "flexible standard" which the Government suggests would in fact be no standard at all for the guidance of either courts or law enforcement agencies.[13]

---

[13]The Scottish cases cited by the Government do not support the Government's position in the instant case, for we are not here dealing with a mere technical infringement, but with a search and seizure by state officers without probable cause in flagrant disregard of a constitutional mandate. Moreover, the case-by-case approach of the cases would not serve the purposes for which the exclusionary rule was adopted. As one commentator has noted:

> "It is doubtful, however, that such a case by case analysis provides the certainty that is needed in this area. The determination in each case tends to leave too much to the visceral reaction of the judge. The Supreme Court itself would have to give each case its individual consideration since the judges in lower courts, without a clearly ascertainable standard, might be prone to make varying judgments. An absolute prohibition or acceptance, by providing certainty, would be a more practical guide to the police than an amorphous standard dependent on all the circumstances of each case. It is desirable that the police, federal and state, know the exact consequences of their acts. Prosecuting attorneys also need to know precisely what evidence is admissible and what is not."
>
> Kohn, *op. cit.*, 3 Wash. L. Q. 251.

Conclusion.

In our opening brief, we pointed out wherein considerations of policy, precedent, logic and equity all dictate that the "silver platter" doctrine should be rejected by this Court. The Government has failed to meet the thrust of our contentions. Accordingly, we respectfully submit once more that the mere fact that the unlawful search and seizure in the instant case was conducted by state police should not be held to render its fruits admissible in the federal courts and that defendant's conviction, based solely upon evidence so obtained, should be reversed.

Respectfully submitted,

CLORE WARNE,

Counsel for Petitioner.

Of Counsel:

HARVEY M. GROSSMAN.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1959.

Jose Terrones Rios, Petitioner,
v.
United States of America.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

An indictment filed in the United States District Court for the Southern District of California charged the petitioner with unlawful receipt and concealment of narcotics in violation of 21 U. S. C. § 174. Before trial the petitioner made a motion to suppress for use as evidence a package of heroin which, so a California court had found, Los Angeles police officers had obtained from the petitioner in an unconstitutional search and seizure. After a hearing the District Court denied the motion to suppress, finding that federal agents had not participated in the search, and finding also that the California officers had obtained the evidence in a lawful manner. The package of narcotics was admitted in evidence over the petitioner's renewed objection at his subsequent trial. He was convicted and sentenced to twenty years in prison.

The Court of Appeals affirmed the conviction, accepting the District Court's finding that the seizure had been lawful, and holding that in any event illegally seized evidence "may nevertheless be received in a federal prosecution if the seizure was made without the participation of federal officials." 256 F. 2d 173, at 176. Certiorari was granted in an order which limited the questions for consideration to two, 359 U. S. 965:

"1. Independently of the state court's determination, was the evidence used against petitioner in the

federal prosecution obtained in violation of his rights under the Constitution of the United States?

"2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?"

In *Elkins* v. *United States*, decided today, the Court has answered the second question by holding that evidence seized in an unreasonable search by state officers is to be excluded from a federal criminal trial upon the timely objection of a defendant who has standing to complain. The only question that remains in this case, therefore, is whether the Los Angeles officers obtained the package of heroin "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." *Ante*, p. —. As in most cases involving a claimed unconstitutional search and seizure, resolution of the question requires a particularized evaluation of the conduct of the officers involved. See *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357.

At about ten o'clock on the night of February 18, 1957, two Los Angeles police officers, dressed in plain clothes and riding in an unmarked car, observed a taxicab standing in a parking lot next to an apartment house at the corner of First and Flower Streets in Los Angeles. The neighborhood had a reputation for "narcotics activity." The officers saw the petitioner look up and down the street, walk across the lot, and get into the cab. Neither officer had ever before seen the petitioner, and neither of them had any idea of his identity. Except for the reputation of the neighborhood, neither officer had received information of any kind to suggest that someone might be engaged in criminal activity at that time and place. They were not searching for a participant in any

previous crime. They were in possession of no arrest or search warrants.

The taxicab drove away, and the officers followed it in their car for a distance of about two miles through the city. At the intersection of First and State Streets the cab stopped for a traffic light. The two officers alighted from their car and approached on foot to opposite sides of the cab. One of the officers identified himself as a policeman. In the next minute there occurred a rapid succession of events. The cab door was opened; the petitioner dropped a recognizable package of narcotics to the floor of the vehicle; one of the officers grabbed the petitioner as he alighted from the cab; the other officer retrieved the package; and the first officer drew his revolver.[1]

The precise chronology of all that happened is not clear in the record. In their original arrest report the police stated that the petitioner dropped the package only after one of the officers had opened the cab door. In testifying later, this officer said that he saw the defendant drop the package before the door of the cab was opened. The taxi driver gave a substantially different version of what occurred. He stated that one of the officers drew his revolver and "took hold of the defendant's arm while he was still in the cab."[2]

---

[1] The petitioner later broke free from the policeman's grasp and ran into an alley. There the officer apprehended him after shooting him in the back.

[2] "Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

"A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left.

"The Court: Then what happened?

"The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his

A state criminal prosecution was instituted against the petitioner, charging him with possession of narcotics, a felony under California law. Cal. Health and Safety Code, § 11500. At a preliminary hearing the two Los

---

billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

"By Mrs. Bulgrin:

"Q. What did the defendant do? What was happening as far as the defendant was concerned?

"A. Well, he appeared to be becoming quite agitated.

"Q. While he was inside the cab?

"A. While he was inside the cab, yes.

"Q. When the door opened did he get out?

"A. Well, there are other events before he got out.

"The Court: What were they?

"The Witness: Well, I am trying to get these in the right order It is difficult because things happened quickly. . . .

"The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, 'We are police officers.' I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, 'We are police officers.'

"I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

"But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him, what is the big idea, something like that. I don't remember my exact words.

"As I recall then Officer Beckmann took the defendant by the arm—

"By Mrs. Bulgrin:

"Q. That was after the defendant got out of the cab, is that correct?

[*Footnote continued on p. 5.*]

Angeles officers testified as to the circumstances surrounding the arrest and seizure. When the case came on for trial in the Superior Court of Los Angeles County, the petitioner moved to suppress as evidence the package of heroin which the police had seized. On the basis of the transcript of the preliminary hearing, and after brief argument by counsel, the court granted the motion and entered a judgment of acquittal.[3]

"A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab. . . .

"The Court: How could you tell the defendant was agitated?

"The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated."

On cross-examination the taxi driver testified as follows:

"Well, I would say that the most prominent thing in my eyesight at the time was this revolver, which looked the size of a cannon. . . .

"At the time he opened the door, I can't say just at what point in the order of these events he drew his revolver, but at some time before or after the door was opened, while Rios was still sitting in the cab, he drew his revolver."

[3] California follows the so-called exclusionary rule. *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. The basis for the trial court's suppression of the evidence is revealed in the following excerpt from the judge's brief oral opinion:

"As I see it, I can't possibly see how this arrest could have originally been attemped under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted—. . .

"I find him not guilty as charged. They will get you sometime, Rios; they didn't get you this time but they will sometime."

Thereafter, one of the Los Angeles officers who had arrested the petitioner discussed the case with his superiors and suggested giving the evidence to United States authorities. He then got in touch with federal narcotics agents and told them about the petitioner's case. This led to the federal prosecution we now review.[1]

In holding that the package of heroin which had been seized by the state officers was admissible as evidence in the federal trial, the District Court placed prime reliance upon the silver platter doctrine, there having been no participation by federal agents in the search and seizure. But the court also expressed the opinion, based upon the transcript of the state court proceedings and additional testimony of the two Los Angeles police officers at the hearing on the motion to suppress, that the officers had obtained the evidence lawfully. The court was of the view that the seizure was permissible as an incident to a

---

[1] "Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

"A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case with him.

"He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

"Q. Whose idea was that? Was that yours or Captain Madden's?

"A. Mine.

"Q. In other words, did you institute the discussion with Captain Madden?

"A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him."

legal arrest, or, alternatively, that the petitioner had abandoned the narcotics when he dropped them to the floor of the taxicab. At the time this opinion was expressed, however, the district judge had not yet heard the taxicab driver's version of the circumstances surrounding the arrest and seizure. The driver did not testify until the trial itself. After he had testified, the package of heroin was offered in evidence. The petitioner's counsel objected, and the court overruled the objection without comment. See *Gouled* v. *United States*, 255 U. S. 298, 312–313; *Amos* v. *United States*, 255 U. S. 313, 316–317; *Jones* v. *United States*, 362 U. S. 257, 264. For all that appears, this ruling may then have been based solely upon the silver platter doctrine. Moreover, the Court of Appeals gave no consideration to the question of the legality of the state search and seizure, relying as it did upon the silver platter doctrine and rejecting the petitioner's contention that the state court's determination of illegality precluded the federal trial court from making an independent inquiry into the matter.

With the case in such a posture, we have concluded that the interests of justice will best be served by remanding the case to the District Court. There, free from the entanglement of other issues that have now become irrelevant, the lawfulness of the policemen's conduct can be determined in accord with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment.

Under these principles the inquiry in the present case will be narrowly oriented. The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones* v. *United States*, 357 U. S. 493, 499; *United States* v. *Jeffers*, 342 U. S. 48, 51. Here justification is primarily

sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding. Compare *Brinegar* v. *United States*, 338 U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Henry* v. *United States*, 361 U. S. 98. This the Government concedes.[5]

If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful or justify a search as its incident. *United States* v. *Di Re*, 332 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *Miller* v. *United States*, 357 U. S. 301; *Henry* v. *United States*, 361 U. S. 98. But the government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony

---

[5] At the time of the arrest the California statute governing arrest without warrant provided as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony." Cal. Penal Code, § 836.

was being committed in their presence.[6] The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.

The judgment is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

---

[6] A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have "abandoned" it. An occupied taxicab is not to be compared to an open field, *Hester* v. *United States*, 265 U. S. 57, or a vacated hotel room, *Abel* v. *United States*, 362 U. S. 217.

SUPREME COURT OF THE UNITED STATES

Nos. 52 AND 126.—OCTOBER TERM, 1959.

Jose Terrones Rios, Petitioner, 52 *v.* United States of America. James Butler Elkins and Raymond Frederick Clark, Petitioners, 126 *v.* United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

The Court today overturns a rule of evidence always the law and formally announced in 1914 by a unanimous Court including Mr. Justice Holmes and Mr. Justice Hughes. *Weeks* v. *United States*, 232 U. S. 383, 398. The rule has since that time been applied in this Court's unanimous *per curiam* decision in 1925 in *Center* v. *United States*, 267 U. S. 575, and for five decades, as a matter of course, in federal prosecutions without number throughout the United States. In 1927, a unanimous Court, on which sat Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone, thus acknowledged the rule: "[w]e do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Byars* v. *United States*, 273 U. S. 28, 33. It can hardly be denied that Mr. Justice Holmes and Mr. Justice Brandeis were the originators and formulators of the body of our present constitutional law pertaining to civil liberties; pronouncements since have

merely been echoes and applications, when not distortions, of principles laid down by them.

Of course our law, and particularly our procedural law, does not stick fast in the past. (Speaking wholly for myself, there is indeed an appropriate basis derived from the nature of our federalism—which I shall later set forth—for modification in the circumstances of the present cases of the rule admitting state seized evidence regardless of the way in which it was seized.) But when a rule of law has the history and the intrinsic authority of the rule overturned today, when it has been for so long a part of the administration of justice in the federal courts, a change, when not constitutionally compelled as the present change concededly is not, must justify itself either by the demands of new experience undermining the justification of the established rule or by new insight into the undesirable consequences of the old rule. The rule the Court newly promulgates today draws upon neither of these justifications and is not supported by any of this Court's previous decisions, while raising serious difficulties in its application, including undue conflict with state law and with state courts.

We are concerned with a rule governing the admissibility of relevant evidence in federal courts. The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. The basic consideration in these cases is whether there are present any overriding reasons for not accepting evidence

concededly relevant to a federal judicial inquiry regarding a violation of federal law.

Overriding public considerations are reflected in the exclusion from evidence of the narrow classes of privileged communications, in the exclusion designed to prevent people from being compelled to convict themselves out of their own mouths developed under the shelter of the Fifth Amendment's privilege against self-incrimination, and insofar as the Due Process Clause of the Fourteenth Amendment puts curbs on the evidentiary law of the States. Respect is also due a further consideration that courts of law are, after all, in the service of justice and that the enforcement of basic moralities by courts should at times be deemed more important than the full utilization of all relevant evidence in a particular case. See *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. Regard for this consideration led Mr. Justice Holmes and Mr. Justice Brandeis to urge that the federal courts should not permit the Department of Justice to become the willing beneficiary of stolen goods through their use in evidence in a federal prosecution: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." It is noteworthy that while this view was expressed by Holmes and Brandeis, JJ. in 1921 in dissent in *Burdeau* v. *McDowell*, 256 U. S. 465, 477, it did not lead them in 1927, in *Byars v. United States*, *supra*, to question the right of the Federal Government to utilize the very kind of evidence involved in these two cases.

Closer to our immediate problem are the evidentiary problems arising out of the interdiction of the Fourth Amendment against "unreasonable searches and seizures." This constitutional provision addresses itself to matters that vitally relate to individual freedom. On this account another exclusion of relevant evidence has been developed in the federal courts in response to what was deemed to

be a compelling public need implicit in that Amendment. Because of what was deemed to be a vital relation to the vindication of the Amendment so that its important protection would otherwise be of "no value," this Court in *Weeks* v. *United States*, 232 U. S. 383, held it appropriate to exclude from federal courts evidence seized by federal officials in disregard of the Fourth Amendment. It was thought more important to exert general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers than to enforce the general principle of relevance in particular cases. This exclusionary rule of *Weeks* has also been applied to violations of federal law by federal officers, closely relating to the interests protected by the Fourth Amendment, although not of the full seriousness of constitutional violations. See, *e. g.*, *Miller* v. *United States*, 357 U. S. 301.

The Fourth Amendment as applied in *Weeks* and cases since, operates as do all the provisions of the Federal Bill of Rights within the limitations imposed by our federal system. It has been held without deviation that the specific provisions of the first eight Amendments are not limitations upon the power of the States or available safeguards of the individual against state authority. Of course the same is true of procedural protections afforded by federal statutes not resting on the Constitution. It has followed from this that, until today, in applying the *Weeks* rule of exclusion a vital question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes. Only if the Federal Government "had a hand" in the search could the Fourth Amendment or federal statutory restrictions, and thus the *Weeks* exclusionary rule, apply. See *Byars* v. *United States*, 273 U. S. 28; *Lustig* v. *United*

States, 338 U. S. 74, 78. The *Weeks* case itself, as has been said, held that state misconduct was not to be the basis for application of the federal exclusionary rule. 232 U. S., at 398. Until today that has been the law of the land.

Have there been developments since *Weeks*, either intellectual or practical, which should lead the Court to overturn the authoritative rule of that case and for the first time bar relevant evidence innocently secured by federal authorities, in cases involving no federal misconduct whatever, where there has been neither violation of the Fourth Amendment nor of a federal statute by federal officers or any agent for them?

The Court finds such a significant development, destroying in its view the "foundations," the "doctrinal underpinning" of the express and authoritative limitation of the *Weeks* exclusionary rule to cases of federal violations, in what was said in 1949 in *Wolf* v. *Colorado*, 338 U. S. 25, 27–28, recognizing that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." The Court asserts that there is no longer any logic in restricting the application of the *Weeks* exclusionary rule to the fruits of federal seizures, for *Wolf* recognizes that state seizures may also encroach on interests protected by the Federal Constitution. The rule which the Court announces on the basis of this analysis is that there is to be excluded from federal prosecutions all evidence seized by state officers "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." As the Court's rule only purports to exclude evidence

seized by state officers in violation of the Constitution, it is plain that the Court assumes for the purposes of these cases that, as a consequence of *Wolf*, precisely the same rules are applicable in determining whether the conduct of state officials violates the Constitution as are applicable in determining whether the conduct of federal officials does so, and precisely the same exclusionary remedy is deemed appropriate for one behavior as for the other.

In this use of *Wolf* the Court disregards not only what precisely was said there, namely, that only what was characterized as the "core of the Fourth Amendment," not the Amendment itself, is enforceable against the States, but also the fact that what was said in *Wolf* was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it. These are constitutional provisions wholly different in history, scope and incidence, and that is crucial to our problem. It is of course true, as expressed in *Wolf*, that some of the principles underlying the specific safeguards of the first eight Amendments are implied limitations upon the States drawn out of the Due Process Clause of the Fourteenth Amendment, and to that extent, but no more, afford federal protection to individuals against state power. But it is basic to the structure and functioning of our federal system to distinguish between the specifics of the Bill of Rights of the first eight Amendments and the generalities of the Due Process Clause translated into concreteness case by case ever since *Davidson* v. *New Orleans*, 96 U. S. 97, by a process of inclusion and exclusion as analyzed with great particularity by Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319.

This vital distinction, running through hundreds of cases, underlies the decision in *Wolf* v. *Colorado*. It is therefore a complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment. The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members of the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn. See, for example, the varying views of the Court as a whole, and of individual members, regarding the "reasonableness" under the Fourth Amendment of searches without warrants incident to arrests, as illustrated by comparing *Marron* v. *United States*, 275 U. S. 192, with *Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452; *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris* v. *United States*, 331 U. S. 145, and *United States* v. *Rabinowitz*, 339 U. S. 56; also *Harris*, *supra*, with *Trupiano* v. *United States*, 334 U. S. 699, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). See also the Court's differing conceptions regarding the evidence necessary to constitute "probable cause" upon which to base a warrant or a search without a warrant as revealed by comparing *Grau* v. *United States*, 287 U. S. 124, 128, with *Draper* v. *United States*, 358 U. S. 307, 312, n. 4 (rejecting *Grau*), and *Jones* v. *United States*, 362 U. S. 257, 270.

What the Court now decides is that these variegated judgments, these fluctuating and uncertain views of what constitutes an "unreasonable search" under the Fourth Amendment in conduct by federal officials, are to determine whether what is done by state police, wholly beyond federal supervision, violates the Due Process Clause. The observation in *Wolf* v. *Colorado*, reflecting as it did the fundamental protection of the Due Process Clause against "arbitrary" police conduct, and not the specific, restrictive protection of the Fourth Amendment, hardly supports that proposition or the new rule which the Court rests upon it. The identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today. It assumes this without explication in reason or in reliance upon authority, and entirely without regard for the essential difference, which has always been recognized by this Court, between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process.

Nor can I understand how *Wolf* v. *Colorado* furnishes the slightest support for the application of the *Weeks* exclusionary rule, designed as that was to enforce the Fourth Amendment and indirectly to discipline federal officers under this Court's peculiarly comprehensive supervisory power over them, to the present cases, where the infractions, if any, were by state officers and were of rights arising under the Due Process Clause of the Fourteenth Amendment. The Court finds what it calls the "ultimate holding" in *Wolf*, namely, that the exclusionary rule is not to be fastened upon state courts in enforcement of rights arising under the protection of the Fourteenth Amendment against arbitrary searches and seizures, something with which "we are not here directly concerned." I fail to understand why this holding is not of essential

relevance to the holding of these cases. In the first place *Wolf* wholly rebuts the Court's assertion that there is no logic in distinguishing how the Fourteenth Amendment is to be enforced against state officials from how the Fourth is to be enforced against federal officers. The point of *Wolf* was that the logic of this was imperative and that the remedies under the two Amendments are not the same. In the second place, in light of the holding of *Wolf* that state courts may admit evidence like that involved in these cases, it cannot be said that there is any sufficient justification based upon controlling the conduct of state officers for excluding such evidence from federal courts, as the Court would do, when gathered by state officials whose States would admit it. The underlying assumption on which the exclusionary rule of *Weeks* rests is that barring evidence illegally secured will have an inhibiting, one hopes a civilizing, influence upon law officers. With due respect, it is fanciful to assume that law-enforcing authorities of States which do not have an exclusionary rule will to any significant degree be influenced by the potential exclusion in federal prosecutions of evidence secured by them when state prosecutions, which surely are their preoccupation, remain free to use the evidence. At any rate, what warrant is there for the federal courts to assume the same supervisory control over state officials as they have assumed over federal officers, even if that control could be effective? And the exertion of controlling pressures upon the police is admittedly the only justification for any exclusionary rule.

Thus, I do not understand how *Wolf* v. *Colorado*, which is the only case relied upon by the Court as authority for its innovation, furnishes support for the Court's new rule of evidence. It seems to me to do the opposite. Nor can the Court's new rule be justified as an effective means for controlling state officers. Neither do I think the Court's adoption of an exclusionary rule in the present cases finds

justification, as the Court suggests, in light of any universal recognition of the need of excluding evidence such as is involved in these cases in order to assure the wise and effective administration of criminal justice. It cannot be denied that the appropriateness of barring relevant evidence as a means for regulating police conduct has not been unquestioned even by those most zealous for honest law enforcement, and it certainly has not gone unquestioned as outweighing the interest of society in bringing criminals to justice. See, *e. g.*, *People* v. *Defore*, 242 N. Y. 13, 21; 8 Wigmore, Evidence (3d ed. 1940), § 2184. And I regret to say that I do not find evidence that the movement towards adoption of the rule of exclusion has been, as we are told, "seemingly inexorable." On the contrary, what impresses me is the obduracy of high-minded state courts, like that of New York under the leadership of Judge Cardozo, in refusing to adopt the federal rule of exclusion. Indeed, this impressive insistence of States not to follow the *Weeks* exclusionary rule was the controlling consideration of the decision in *Wolf* not to read it into the requirement of "due process" under the Fourteenth Amendment. As the material the Court has collected shows, fully half the States have refused to adhere to our *Weeks* rule, nearly fifty years after this Court has deemed it appropriate for the federal administration of criminal justice.

Apart from any affirmative justifications for the new rule, it is suggested in support of the need for making the Court's innovation that the distinction made since *Weeks* v. *United States* for purposes of excluding evidence, turning on whether or not federal officials had any share in the search, has engendered practical difficulties and for that reason ought now to be discarded. It is also suggested that the rule which has prevailed under *Weeks* and *Byars* to this day "implicitly invites federal officers to withdraw from such association [with state law-enforcement offi-

cers] and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom." I am not aware of evidence to sustain the view that the distinction between federal and state searches has been particularly difficult of application. Individual cases have merely presented the everyday issue of evaluating testimony and testimony touching an issue relatively easy of ascertainment. I know of no opinion in any federal court, and the Court points to none, which has revealed any consciousness of having been confronted with too exacting a task for adjudication when called upon to decide whether a search was or was not to be deemed a federal search. This Court's decisions certainly do not reflect an awareness of such difficulties. And if the rule, as appears from the decisions of the judges who have had to apply it, has evidently been in general a workable one, it surely should not be discarded because of unsupported assumptions that federal officials are prone to evade it and to cooperate secretly with state police in improper activities. Disregard of the history, authority and experience that supports the rule now cast into limbo ought to have a more substantiated justification than the fragile assumption that federal officers look for opportunities to engage in, to use the Court's language, "subterfuge" and "evasion" of a command sanctioned by this Court. I would not so belittle this Court's authority. I had supposed we should attribute to the law-enforcing authorities of the Government respect for this Court's weighty course of decisions and not a flouting of them.

Whatever difficulties of application there may be in the present rule—and the opinions of those who have had to apply it do not indicate that they are significant—they surely cannot lead us to exchange a tried and settled principle for the Court's new doctrine. For that doctrine, although the Court purports to be guided by the practical consequences of rules of evidence in this

area and by considerations of comity between federal and state courts and policies, not only raises new and far greater difficulties than did the old rule, but is pregnant with new disharmonies between federal and state authorities and between federal and state courts.

First. The Court's new rule introduces into the law governing the admissibility of search and seizure evidence in federal prosecutions a troublesome and uncertain new criterion, namely, the "unconstitutionality" of police conduct, as distinguished from its mere illegality under state or federal law. Under the rule the Court today announces the federal trial court, whenever state-seized evidence is challenged, must decide the wholly hypothetical question whether that evidence was "obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." Irrelevant are violations of state law, or hypothetical violations of federal statutes, had the search been "conducted by federal officers."

The *Weeks* rule of exclusion, as enforced by this Court, applies to all illegal seizures on the part of federal officers. If the officer's conduct is by statute or court-developed rule illegal, the evidence is excluded, and it is not necessary to say whether or not the rule of conduct flows directly from the Constitution. This has been an efficient, workable evidentiary criterion unencumbered with weighty constitutional distinctions. See, for example, *Miller* v. *United States*, 357 U. S. 301, where evidence was excluded without a mention of the Constitution. This Court or the lower federal courts have thus never, until today, needed to develop criteria distinguishing those federal regulations of the conduct of federal officers which are compelled by the Constitution from those which are entrusted to the discretion of Congress or the courts to develop. We must do so now, and so must federal trial courts concern them-

selves with such constitutional determinations in the midst of adjudicating motions to suppress state evidence. This is bound to be a troublesome process in light of the complete absence of such criteria. For example, are the special federal provisions regarding night search warrants of a constitutional nature? And what of the rules governing the execution of lawful warrants, applied in *Miller v. United States, supra*? We have never needed to pronounce upon these totally abstract and doctrinaire questions, and there surely is no need to announce a rule which forces us to do so, now, when such a rule is not constitutionally required, but is concededly imposed as a matter of this Court's discretionary power to formulate rules of evidence for federal litigation. After all, it makes not the slightest difference from the point of view of the admissibility of evidence whether what a federal officer does is simply illegal or illegal because unconstitutional. Why introduce such subtleties, in a hypothetical federal context, when passing on state evidence?

Second. The Court's new rule potentially frustrates and creates undesirable conflict with valid and praiseworthy state policies which attempt to protect individuals from unlawful police conduct. Although the Court purports to be responsive to the needs of proper law enforcement and to considerations of comity between state and federal law, when it comes to elaborate its new rule its does so as follows: "[t]he test is one of federal [constitutional] law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." So comity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law. State law seeking to control improper methods of law enforcement is frustrated by the Court's new rule whenever a State which enforces an exclusionary rule places restrictions upon the conduct of its officers not directly

required by the Fourth Amendment with regard to federal officers. The Court's new rule will, for example, admit evidence illegally seized under a state law which is identical to a federal statute restricting federal officers, so long as the federal statute goes beyond the minimum requirements of the Constitution. One would suppose that such a situation would be one in which this Court would plainly respect the state policy as constituting nothing but a local duplication of a federal policy. Yet the rule promulgated today flouts such a state regulation. A state officer who disobeys it needs only to turn his evidence over to the federal prosecutor, who may freely utilize it under today's innovation in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities.

I do not merely indulge in assumptions regarding the serious frustrations of valid state regulations of state law enforcement officers which may arise from the rule formulated today. Take a concrete example of this mischief. In *Breithaupt* v. *Abram*, 352 U. S. 432, this Court decided that it did not violate the Fourteenth Amendment for a State to take blood from a defendant without his consent and use it in evidence against him, for such police methods were found not to be "offensive" or "unreasonable." Nevertheless, States may decide, and have decided, that taking blood without consent is by state standards reprehensible, and that to discourage such conduct by its police blood-test evidence must be suppressed in use in state prosecutions. See *Lebel* v. *Swincicki*, 354 Mich. 427; *State* v. *Kroening*, 274 Wis. 266, 271–276. Such a state policy is surely entitled to our respect if we are to exclude evidence on the basis of the illegal activity of state officers. Yet because of the decision in *Breithaupt*, the Court's new rule permits the admission of blood-test evidence in a federal prosecution, ignoring the State's decision that the police conduct pro-

ducing it is illegal and that it therefore ought to be suppressed. And the same is to be true of evidence seized by state police in violation of a state rule regarding searches incident to lawful arrests which is more restrictive upon the police than the present version of the fluctuating federal rule, or of evidence seized pursuant to a warrant or to an arrest without a warrant which did not meet state standards of "probable cause" more restrictive than the federal standards as lately developed. State rules in these areas may be and in some States are more restrictive than federal rules. See, for example, restricting the right of incidental search more than has this Court, *State* v. *Adams*, 103 W. Va. 77; *State* v. *Buckley*, 145 Wash. 87; *Flannery* v. *Commonwealth*, 324 S. W. 2d 128 (Ky.); *Doyle* v. *State*, 320 P. 2d 412 (Okla.); and imposing more exacting standards of "probable cause," than federal law imposes, *Doyle* v. *State*, 320 P. 2d 412 (Okla.) (expressly refusing to follow *Brinegar* v. *United States*, 338 U. S. 160); *Averill* v. *State*, 52 So. 2d 791 (Fla.); *People* v. *Thymiakas*, 140 Cal. App. 2d 940. Especially pertinent in this regard is the following statement in *People* v. *Cahan*, 44 Cal. 2d 434, 450, adopting an exclusionary rule for California: "In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them."

In fact, in the very two cases now before the Court state courts have found their officers' conduct illegal and have ordered suppression of the evidence thereby gained. Yet the Court refuses to respect these findings and sends the cases back to the District Courts for independent

rulings regarding the federal constitutional validity of the state officer's conduct. If these state infractions are not found to be of constitutional dimensions, and it is surely doubtful whether they were of that degree of seriousness under some of our decisions, the evidence will be admitted though wrongfully seized under the governing state law. The rule promulgated today would thus undo a State's disciplinary policy against police misconduct, while in the contrary situation, where the State would admit evidence now rejected by the Court, police conduct sustained by state law would not be affected.

Third. The Court's new rule creates potential conflict between federal and state courts even when the legal standards of police conduct upon which exclusion is to turn are the same in both courts. The Court says that "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." Again, considerations of comity are ignored. Applying the same legal standards, a federal tribunal may hold state officers blameless after a state court has condemned their conduct, or it may hold them to have been at fault after the State has absolved them. I cannot imagine the justification for permitting a federal court to make such conflicting pronouncements, debilitating local authority in matters over which the local courts should and do have primary responsibility.

In summary, then, although the Court professes to be responsive to "[t]he very essence of a healthy federalism" and "the avoidance of needless conflict between state and federal courts," the rule it actually formulates is wholly unresponsive to valid state policies while carrying a great risk of needless conflict between state and federal policies and between state and federal courts. With regard to

evidence from States which have not adopted exclusionary rules, the Court's innovation of today deprives the federal courts of relevant evidence through hazardous constitutional determinations without any significant or legitimate compensating effect upon state or federal law enforcement. In States which do apply an exclusionary rule, the Court's new formulation accords no respect to valid state policies and is a source of conflict with state courts. The Court promulgates a rule whose only practical justification is the regulation of state officials without the slightest regard for achieving harmony with valid state laws which necessarily must be the primary concern of those officials. And although the Court recognizes considerations of "judicial integrity" in accepting illegally seized evidence, it refuses to respect state determinations that certain evidence has in fact been illegally gathered under the applicable law.

I would agree wholly with my Brothers CLARK, HARLAN and WHITTAKER, who join me in the reasons for dissenting from the Court's decision, that the judgments should be affirmed if, like them, I found the only choice to be one between the *Weeks-Byars* doctrine and today's decision. For me, however, the course of events since the promulgation of the *Weeks* doctrine suggests a modification of it consonant with the thinking of *Weeks* and therefore not essentially departing from it. I would modify the *Weeks-Byars* rule to give due heed to appropriate comity between federal and state court determinations and due respect for the discretion left to the States by *Wolf* v. *Colorado* to develop and apply exclusionary rules upon their own initiative and I therefore would exclude the evidence in these cases on the basis of state decisions to suppress it. Specifically, I would recognize that about half the States have now adopted exclusionary rules although only one State had such a rule when the *Weeks* case was decided. It respects what was decided in *Weeks* regarding state-

seized evidence for the federal courts now to adjust their rules of evidence to support the States which have adopted the *Weeks* exclusionary rule for themselves, thereby exercising the same control over state officials as *Weeks* found it appropriate for the federal courts to exercise over federal officials. Thus, although I find no good reason not to admit in federal courts evidence gathered by state officials in States which would admit the evidence, I would not admit such evidence in cases like the present, where state courts, enforcing their exclusionary rules, have found their officers guilty of infractions of the rules properly regulating their conduct and have suppressed the evidence. Just as Mr. Justice Holmes and Mr. Justice Brandeis in *Burdeau* v. *McDowell*, 256 U. S. 465, deemed it not seemly for a federal court to allow the Department of Justice to be the knowing beneficiary of stolen goods, so it seems to me unseemly for a federal court not to respect the determination of a state court that its own officials were guilty of wrongdoing and not to support the State's policy to prevent those officials from making use through federal prosecution of the fruits of their wrongdoing. Dealing with the generality of cases, as rules of evidence should, to let a state determination regarding the legality of the conduct of state officials determine the admissibility in a federal court of evidence gathered by them would not only avoid a retrial of identical issues in the federal court, but would also avoid the unseemliness and disruption of state authority involved in having a federal court decide that a search was legal, as it might well do when the federal constitutional standards are narrower than state standards, after a state court has adjudged the search illegal.

I am not unmindful that this has its own difficulties, as for instance, the fact that state motions to suppress are normally determined only by a trial judge and are generally not reviewable at all if granted and followed

by acquittal. And so a state court decision may not inevitably reflect the State's judicial policy as formulated by its highest court. Difficulties would also be present when there has been no state decision regarding the legality of the seizure, and when it is not clear to the federal court which must decide upon admissibility what the state decision would be. Occasionally, a state decision might unjustifiably frustrate an important federal prosecution dependent upon state-seized evidence. These are difficulties inherent in evolving harmonious relations in the interconnected interests between the States and the Nation in our federal system. The consequences of these difficulties seem to me far less weighty and much less dubious than those of the upsetting decision of today. They seem to me outweighed by the support which should be afforded to valid state law enforcement.

If the modified rule I have outlined is not to be adopted, however, the difficulties in the Court's decision make it far more preferable in my view to continue adherence to the sharp line drawn by *Weeks* and *Byars* between state- and federally-seized evidence. I would not embark upon a hazardous jettisoning of a rule which has prevailed in the federal courts for half a century without bringing to the surface demonstrated evils, indeed without its having evoked serious criticism of weight, barring recent discussion largely of an abstract and doctrinaire nature.*

*See the authorities cited in the Court's note 2, and see *Hanna v. United States*, 260 F. 2d 723, the only Court of Appeals decision to concur with the views the Court today expresses. What criticisms there have been of the *Weeks* rule have largely been stimulated by *Wolf* and have in essence been reflections of dissatisfaction with the substantive decision in that case, and thus do not constitute supports for the doctrine now evolved by the Court.

SUPREME COURT OF THE UNITED STATES

Nos. 52 AND 126.—OCTOBER TERM, 1959.

Jose Terrones Rios, Petitioner, 52 *v.* United States of America. James Butler Elkins and Raymond Frederick Clark, Petitioners, 126 *v.* United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

Memorandum of MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join.

I subscribe to all that my Brother FRANKFURTER has written in criticism of the Court's newly fashioned exclusionary rule. But, with deference, I must also say that, in my view, the arguments which he has so convincingly set forth likewise serve to block the more limited inroads which he would make on the so-called "silver platter" doctrine. *Lustig* v. *United States*, 338 U. S. 74, 79. I would retain intact the nonexclusionary rule of the *Weeks* and *Byars* cases, which has behind it the strongest judicial credentials, the sanction of long usage, and the support of what, in my opinion, is sound constitutional doctrine under our federal scheme of things, doctrine which only as recently as last Term was reiterated by this Court. See *Abbate* v. *United States*, 359 U. S. 187; *Bartkus* v. *Illinois*, 359 U. S. 121. Except for this reservation, I join the dissenting opinion of my Brother FRANKFURTER.

I would affirm the judgments in both of the cases before us.